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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ERNST & WHINNEY, a partnership; MICHAEL W. TRAPP, OLIVER C. MURRAY, JR., JERRY L. YOHEY, THOMAS P. HENSLER, III, ROBERT J. TAYLOR, IV, JOHN W. HYATT, JR., STEPHEN W. IMLER, JOHN DOE I through JOHN DOE V, Officers, Agents and Employees of Ernst & Whinney,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) May the federal courts use a general statutory grant of equitable jurisdiction to issue writs and orders as a basis for creating new substantive obligations not otherwise provided by law?

(2) May the federal courts use a general jurisdictional provision as a basis for creating a broad injunctive remedy on behalf of the government when Congress has enacted a comprehensive remedial plan specifically limiting the circumstances in which the government may obtain injunctive relief?

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ERNST & WHINNEY, a partnership; MICHAEL W. TRAPP, OLIVER C. MURRAY, JR., JERRY L. YOHEY, THOMAS P. HENSLER, III, ROBERT J. TAYLOR, IV, JOHN W. HYATT, JR., STEPHEN W. IMLER, JOHN DOE I through JOHN DOE V, Officers, Agents and Employees of Ernst & Whinney,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Ernst & Whinney, a partnership, and certain present and former partners or employees of Ernst & Whinney pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eleventh Circuit reversing the United States District Court for the Northern District of Georgia.

The Court of Appeals held, *inter alia*, that a provision of the Internal Revenue Code which grants federal courts jurisdiction to issue writs and orders to aid in the enforcement of the internal revenue laws, 26 U.S.C. § 7402 (a) (1982), permits the United States to seek to enjoin petitioners nationwide from providing specified tax ad-

visory services to their clients; it held specifically that such an injunction could be issued in instances where, as the government acknowledges, the complaint does not allege that petitioners violated any provision of the internal revenue laws. If allowed to stand, the decision would provide the United States with a broad right to seek injunctions against both taxpayers and non-taxpayers when no provision of the Internal Revenue Code has been violated.

The Eleventh Circuit determination conflicts with decisions of this Court that a statutory grant of jurisdiction to a federal district court to issue writs and orders does not confer authority to create substantive obligations. This Court and other federal courts have repeatedly emphasized that the creation of rights and duties by statute is a legislative function which should not be usurped by the judiciary.

The injunctive right fashioned by the Court of Appeals also conflicts with a comprehensive remedial plan established by Congress which carefully limits the circumstances in which the government may seek injunctions against tax advisers such as E&W. Congress' remedial plan provides for injunctive remedies against particular parties and specific conduct, but expressly limits the availability of such relief. Under the legislative plan, the government would not be permitted to obtain an injunction such as that sanctioned by the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 735 F.2d 1296 (11th Cir. 1984), is set forth in the Appendix hereto at 1a-20a. The order of the Court of Appeals correcting its opinion and otherwise denying E&W's petition for rehearing is set forth in the Appendix at 42a-43a. The opinion of the United States District Court for the Northern District of Georgia, reported at 549 F. Supp. 1303 (N.D. Ga. 1982), is set forth in the Appendix at 21a-37a.

JURISDICTION

The judgment of the Court of Appeals was dated and entered July 6, 1984 (40a-41a). Petitioners' timely request for rehearing was granted for the purpose of correcting the opinion and denied in other respects on August 29, 1984 (42a-43a). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c) (1982).

STATUTES AND REGULATION INVOLVED

26 U.S.C. §§ 7402(a), 7407, 6694, 7408, 7701(a)(36) (1982); and Treas. Reg. § 1.6694-1(a)(4) are set forth in the Appendix.

STATEMENT OF THE CASE

1. The Parties

E&W is a firm of independent accountants. It performs audit, tax and management consulting services for its clients throughout the United States and worldwide. One of the services E&W provides is the identification of property that may qualify for the investment tax credit ("ITC") pursuant to Sections 38 and 48 of the Internal Revenue Code ("Code"), 26 U.S.C. §§ 38, 46-48 (1982). The ITC is a direct credit against taxes in the amount of ten percent of the cost of business property as defined by the Code. The ITC is an important tax measure by which the government seeks to encourage business investment.

In providing its investment tax credit services E&W customarily examines a client's property and identifies items which qualify for the credit. It gathers cost data, determines the cost to the taxpayer of the qualified property, and prepares a report for the taxpayer in which the recommended items and their costs are itemized and supported by written argument. E&W's report is

available to the IRS and is frequently provided in support of its clients' ITC claims.

E&W personnel regularly meet with the IRS to advocate the ITC claims of the firm's clients. Treasury Regulations expressly permit a firm such as E&W to advocate the claims of its clients even when the positions taken by the taxpayers are contrary to those of the IRS. Such advocacy is expressly permitted so long as there is a good faith reasonable basis for the positions taken. Treas. Reg. § 1.6694-1(a)(4), T.D. 7519, 1978-1 C.B. 397.

E&W has been performing such ITC-related tax services for a decade, for hundreds of clients across the nation. Similar services are performed by other highly respected large and small accounting and consulting firms on behalf of taxpayers throughout the United States. Representatives of seven such other firms have submitted affidavits in the District Court in support of E&W's ITC practices.

2. The Complaint and Statutory Framework

The government's complaint, filed on March 12, 1982, sought a nationwide injunction against alleged ITC practices of E&W and against E&W's ITC practice as a whole, including its advocacy of client positions. The complaint alleged that the District Court had jurisdiction of the case pursuant to 28 U.S.C. §§ 1340, 1345 (1982) and 26 U.S.C. §§ 7402(a), 7407 (1982). It alleged further that E&W had engaged in "false, misleading and deceptive conduct" in providing ITC services and had habitually advised its clients to claim the ITC on property that was either subject to legal dispute as to qualification or allegedly unqualified for the credit.

The complaint of the United States was purportedly filed pursuant to two statutory provisions, Sections 7407 and 7402(a) of the Internal Revenue Code. Section 7407, enacted as part of the Tax Reform Act of 1976, permits the government to seek an injunction against a tax return

"preparer", as defined in Section 7701(a)(36), which was also enacted in 1976. A "preparer" as so defined is a party who has prepared all or a substantial portion of another's tax return. A person who advises or assists a taxpayer in the preparation of a return but who neither signs the return nor prepares a substantial portion of the return (hereinafter an "adviser") is, under the congressional plan, excluded from the Section 7407 injunctive provision.

Although providing an injunctive remedy, Section 7407 specifically provides that certain types of injunctions are barred if the "preparer" posts a statutory bond:

> "No action to enjoin under subsection [7407](b)(1)(A) shall be commenced or pursued with respect to any income tax return preparer who files and maintains, with the Secretary . . . a bond in a sum of $50,000 as surety for the payment of penalties under section 6694 and 6695."

26 U.S.C. § 7407(c) (1982). In the event such a bond is posted, Congress determined that the government is precluded from seeking an injunction against the preparer in a federal district court. Instead, the government is permitted by other provisions of the Internal Revenue Code (Section 6694) to litigate its claims in administrative penalty proceedings. As reflected in the legislative history, the bonding provision of Section 7407(c) was enacted to assure that when a return preparer is financially responsible and can pay possible penalties, it can *as of right* terminate expensive and formal federal district court injunction proceedings. Instead, its dispute with the government can be resolved in more informal and less costly penalty proceedings. *See* H. Rep. No. 658, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 2897, 3175-76.

The government alleged in its complaint that in those instances where E&W had been acting as a preparer for ITC clients, its actions fell within the provisions of Sec-

tion 7407. In the alternative, it alleged that in any instance where E&W was not found to be a "preparer", Section 7402(a) would provide a proper statutory basis for injunctive relief. Section 7402(a), which is a provision granting jurisdiction to the district courts to issue writs and orders, provides:

> "*Jurisdiction of district courts*
>
> (a) *To issue orders, processes, and judgments.*— The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

26 U.S.C. § 7402(a) (1982).[1] Section 7402(a) does not purport to impose duties or obligations in addition to those imposed by other internal revenue laws. It or its lineal predecessors have been in existence in essentially the same form since 1919.

3. E&W's Motion to Dismiss

On March 15, 1982 E&W posted statutory bonds pursuant to Section 7407(c) to bar the government's injunction action. On May 24, 1982, after E&W had posted its bonds and the government had declined to withdraw its

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[1] In the Court of Appeals, the government also argued that, apart from any statute, the United States had a general power to obtain injunctions against interference with governmental functions. E&W submitted that the Executive's authority to obtain non-statutory injunctions was not so unlimited. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 742-43 (1972) (Marshall, J., concurring). The Court of Appeals did not base its decision on the argument by the government that it had a broad non-statutory right to obtain injunctions or that the courts had inherent equitable power to grant them.

action, E&W moved to dismiss the complaint, urging that the posting of statutory bonds precluded the government from proceeding against it as a return preparer other than in administrative penalty proceedings. To the extent it was an adviser and not a preparer, E&W urged that it was not alleged to have violated any provision of the Internal Revenue Code, and that by the express design of Congress no civil injunctive remedy was applicable. E&W argued that Section 7402(a) was only a jurisdictional provision and had no force absent a violation of an underlying substantive provision of the Internal Revenue Code.[2]

4. The District Court's Dismissal of the Complaint

The District Court granted E&W's motion on November 2, 1982, and dismissed the government's action in its entirety, holding that the action could not be maintained under either Section 7407 or Section 7402(a) (21a-37a). The Court ruled that injunctive relief against E&W as a preparer under Section 7407 was barred because E&W had posted bonds pursuant to Section 7407(c) (32a). The District Court further ruled that the jurisdictional provisions of Section 7402(a) could not be used to support injunctive relief against E&W as an adviser because Section 7402(a) did not authorize the government to seek an injunction in the absence of the violation of a substantive Code provision defining an adviser's civil liability or duty (37a). The government did not (and cannot) specify in its allegations any civil provision estab-

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[2] E&W also submitted substantial exhibit volumes and numerous detailed affidavits supporting its position that the government allegations as to E&W's ITC practice are materially incorrect and that what the United States characterizes as misconduct represents no more than legitimate advocacy of client positions on the part of E&W. Neither the District Court nor the Court of Appeals reached those factual issues, and they do not have any bearing on the purely legal issues before this Court.

lishing a substantive obligation or duty on the part of E&W as a tax adviser.[3]

5. The Decision of the Court of Appeals

On appeal by the government, the Eleventh Circuit agreed with the District Court that once E&W had posted bonds, for the most part the injunctive relief sought by the government against E&W as a preparer was barred by Section 7407(c) (15a-18a). However, the Court of Appeals reversed a narrow part of the District Court's holding with respect to Section 7407. It constructed a theory, which it conceded might have no factual support and which had been neither pleaded by the government nor briefed by the parties. Under its theory, a narrow portion of the government's action under Section 7407 would be allowed to proceed in the District Court against E&W as a preparer notwithstanding the posting of bonds (19a-20a). The Court of Appeals concluded that while an injunction against E&W as a preparer was barred as to the vast majority of allegations in the complaint, it *might* not be barred if E&W could be shown to have engaged in specific misleading advertising practices concerning its ITC services (20a).

To the extent that E&W was not a return preparer but an adviser, the Court of Appeals reversed the District Court and held that Section 7402(a) alone authorized an injunction where there had been no violation of any obligation or duty imposed by the Internal Revenue

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[3] In its brief to the Court of Appeals, the government argued that criminal provisions of the Code provide a source of implied duties of tax advisers, whether or not defendants' conduct is actually proscribed by those criminal provisions. However, it is well established that civil injunctions may not issue to enjoin criminal conduct absent a basis for injunctive relief other than a criminal statute, *In re Debs*, 158 U.S. 564, 593-600 (1895), and the government did not and cannot allege actual violations of any criminal statute. The Court of Appeals did not accept the government's contention.

Code. It held expressly and unequivocally: *"there need not be a showing that a party has violated a particular Internal Revenue Code section in order for an injunction to issue" under 7402(a)* (7a). (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals construes Section 7402(a) in a manner that conflicts with the decisions of this Court and various federal courts of appeals and with the comprehensive plan established by Congress for enforcement of the Internal Revenue Code. The decision transforms a jurisdictional provision to issue writs and orders into a vehicle by which federal courts may enjoin persons for conduct that does *not* and is not alleged to violate the Internal Revenue Code. It permits federal courts to define new, non-statutory, substantive obligations under the tax laws. It judicially extends the circumstances in which the government may seek an injunctive remedy to a class of tax advisers whom Congress *explicitly* chose not to subject to injunctive proceedings.

This Court should grant certiorari to review the decision because the issues presented are purely legal, there are no disputed facts that bear on the resolution of the issues presented, and the congressional plan will be frustrated by allowing a proceeding to go forward which conflicts with that plan. This Court has often before granted certiorari prior to a full trial on the merits when, as here, the legal questions involved were "fundamental to the further conduct of the case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). The granting of certiorari prior to a full trial on the merits is particularly appropriate when, as in this case, the issue is whether the matter should be determined in a court proceeding or administrative proceed-

ing, *see Green v. United States*, 376 U.S. 149 (1964) (certiorari granted to review Court of Claims pretrial order suspending court proceedings pending petitioner's exhaustion of further administrative remedies); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43-44 (1938) (certiorari granted to review district court's entry of preliminary injunction against continuance of administrative proceedings prescribed by Congress), or when the issue is the manner in which the case should be tried. *Beacon Theatres v. Westover*, 359 U.S. 500, 501, 504 (1959) (certiorari granted to review determination that particular issues should be tried by a federal judge rather than a jury). Because the issues presented in this petition concern what type of proceeding, if any, is appropriate as a matter of law, it is important that the Court consider the issues now, not after what could be years of litigation in a forum not intended by Congress.

1. The Decision of the Court of Appeals Conflicts With the Decisions Of This and Other Courts as to the Proper Scope of Jurisdictional Provisions and the Impropriety of Government by Injunction

In enacting Section 7402(a), Congress provided federal courts with jurisdiction and authority only to issue writs and orders, including writs and orders of injunction, writs of *ne exeat republica*, and orders appointing receivers, "as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. § 7402(a) (1982). Because Section 7402(a) itself imposes no substantive duty or obligation not otherwise provided in the Code, the Eleventh Circuit's construction of Section 7402(a) is in direct conflict with decisions of this Court that statutes which merely grant federal courts jurisdiction to issue equitable writs or orders do not empower such courts to create substantive duties.

In *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), this Court held that where a substantive provision of the law imposes no lia-

bility on a party, an injunction may not issue based solely on the All Writs Act, 28 U.S.C. § 1651 (1982), or on general equitable principles:

> "We read these earlier decisions as recognizing 'fundamental limitations on the remedial powers of the federal courts.' 425 U.S., at 293. *Those powers could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and the extent of that violation. Id.*, at 293-294. This principle, we held, was not one limited to school desegregation cases, but was instead 'premised on a *controlling principle governing the permissible scope of federal judicial power*, a principle not limited to a school desegregation context.' *Id.*, at 294, n.11.
>
> We think that the principle enunciated in these cases, transposed to the instant factual situation, offers no support for the imposition of injunctive relief against a party found not to have violated any substantive right of respondents."

458 U.S. at 399, *quoting Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976) (emphasis supplied).

The All Writs Act, which was urged as a basis for an injunction in *General Building Contractors*, provides the federal courts with power to issue various types of writs in aid of their jurisdiction. It is similar in language and identical in principle to Section 7402(a), which grants the courts power to issue writs and equitable orders for the purpose of enforcing the Internal Revenue Code. The decision below is in direct conflict with the *General Building Contractors* holding that the naked authority to issue an injunction does not carry with it a concomitant general authorization to define the element of conduct which may be enjoined.

In *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), this Court adhered to the same concept of appropriate judicial restraint. It held that a private right of action could not be based on Section 27 of the Securities

Exchange Act of 1934 because "Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; *it imposes no liabilities.*" 442 U.S. at 577 (emphasis supplied).

The decision below also conflicts with the ruling of the Ninth Circuit Court of Appeals in *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283 (9th Cir. 1979). In that case, the federal Occupational Safety and Health Administration ("OSHA") charged that Plum Creek sought to interfere with OSHA inspections by directing Plum Creek employees not to wear air-quality and noise-level testing devices. Relying on the jurisdictional provisions of the All Writs Act, 28 U.S.C. § 1651(a), and upon the powers of a court of equity, OSHA sought an injunction ordering the company to change its policy so that OSHA could more effectively carry out its regulatory duties. In an argument virtually identical to the government's argument in this case, OSHA urged that notwithstanding the absence of a statutory duty imposed on the company, injunctive relief was warranted to prevent the alleged interference with its efforts to enforce the law. The Ninth Circuit held that absent a violation of a substantive statute or regulation, the employer could not be enjoined "so that OSHA can more efficiently conduct an investigation." 608 F.2d at 1290. The Court stated:

> "This circuit has never held that the district court has such wide-ranging inherent powers that it can impose a duty on a private party when Congress has failed to impose one. To so rule would be to usurp the legislative function and to improperly extend the limited federal court jurisdiction."

Id.

The use of a jurisdictional provision merely authorizing the issuance of writs or orders as the basis for courts to define new substantive obligations also conflicts with the principles emphasized in one of the opinions in *New*

York Times Co. v. United States, 403 U.S. 713, 741 (Marshall, J., concurring): "[t]he issue is whether this Court or the Congress has the power to make law." Even though it may be "more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law" the Constitution forbids "government by injunction." 403 U.S. at 742-43.

Several courts of appeals have reached the same conclusion: that government by injunction is an inappropriate departure from the concept of separation of powers and courts should be restrained in fashioning new duties or obligations that Congress has not elected to impose. *See United States v. City of Philadelphia*, 644 F.2d 187, 192-96 (3d Cir. 1980) (refusal to imply injunctive right of action for violations of Fourteenth Amendment rights of individuals when such an additional statutory remedy would be significantly broader than that which Congress explicitly chose to provide); *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) (refusal to imply a right to injunctive relief sought by government to protect constitutional rights of the mentally retarded absent express statutory approval); *United States v. Solomon*, 563 F.2d 1121, 1126-29 (4th Cir. 1977) (refusal to allow government to maintain action to redress violations of constitutional rights of institutionalized mentally retarded absent express authority to sue).

The construction of Section 7402(a) by the court below is also in direct conflict with decisions of this Court and various circuit courts that tax law is statutory and is not to be extended by courts beyond the precise duties and penalties prescribed by Congress on the face of the statute. As Justice Story wrote in 1842, in interpreting revenue statutes the courts are not "to enlarge their operation so as to embrace matters, not specifically

pointed out [in the statute]" because "[r]evenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed." *United States v. Wigglesworth*, 28 F. Cas. 595, 596-97 (C.C.D. Mass. 1842) (No. 16,690) (Story, J.). This Court has consistently adhered to this principle when applying tax provisions. *See Crooks v. Harrelson*, 282 U.S. 55, 61 (1930); *United States v. Merriam*, 263 U.S. 179, 187-88 (1923); *Gould v. Gould*, 245 U.S. 151, 153 (1917). *See also C'de Baca v. Commissioner*, 326 F.2d 189, 191 (5th Cir. 1964) (IRS may not impose a penalty that is not literally prescribed in the statute); *Hornberger v. Commissioner*, 289 F.2d 602, 604-05 (5th Cir. 1961) (IRS cannot impose reporting requirement not expressly provided by statute). *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947) (the collection and protection of revenues is an area of the law reserved to Congress: "[w]hen Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end").

Consistent with the foregoing authorities and with the statutory language of Section 7402(a), for years courts used that section solely as a basis for issuing equitable writs and orders to implement substantive liabilities imposed by *other* Internal Revenue Code provisions. *See, e.g., United States v. First National City Bank*, 379 U.S. 378 (1965) (Section 7402(a) used to enforce a jeopardy assessment pursuant to Section 6851(a) for an existing tax liability); *United States v. First National City Bank*, 568 F.2d 853, 855-56 (2d Cir. 1977) (Section 7402(a) used to prevent a bank from transferring assets of a taxpayer against whom the IRS had already made a jeopardy assessment pursuant to Section 6851(a), a demand for payment pursuant to Section 6861(a), a notice of deficiency under Section 6861(b), and a jeopardy levy

pursuant to Section 6331(a)); *In re Carlson*, 580 F.2d 1365, 1373 (10th Cir. 1978) (Section 7402(a) used to enforce tax levies following jeopardy assessments and tax levies under Sections 6301, 6302(a) and (b), 6303, 6321, and 6331(a) of the Code); *Brody v. United States*, 243 F.2d 378, 384 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957) (Section 7402(a) used to require a defendant to give information under oath concerning the disposition of certain funds following a jeopardy assessment under Section 6331(a) and the issuance of a Section 7602 summons); *In re Gerwig*, 461 F. Supp. 449, 450 (C.D. Cal. 1978) (Section 7402(a) used for issuance of an *ex parte* order authorizing entry onto taxpayer's premises following assessments of taxes under substantive Sections 6201, 6202, and 6203; a Section 6321 demand for payment; and the creation of lien under Sections 6321 and 6322).

Notwithstanding this precedent for using Section 7402 (a) only to enforce specific substantive provisions of the Code, the court below relied on three "tax protestor" *pro se* cases, all of which were decided in the last two years, as authority for holding that Section 7402(a) permits courts to enjoin conduct not prohibited by substantive provisions of the Code. *United States v. Ekblad*, 732 F.2d 562 (7th Cir. 1984); *United States v. Hart*, 701 F.2d 749 (8th Cir. 1983); and *United States v. Van Dyke*, 568 F. Supp. 820 (D. Or. 1983). Each of the "tax protestor" cases involved persons who believed, based on alleged constitutional and moral grounds, that they should not have to pay taxes. In none of the three "tax protestor" cases was the meaning of Section 7402 (a) briefed by the *pro se* defendants.[4] If the "tax pro-

[4] The Court below also cited two *pro se* tax return preparer cases in support of its decision, *United States v. Landsberger*, 692 F.2d 501 (8th Cir. 1982), and *United States v. May*, 555 F. Supp. 1008 (E.D. Mich. 1983). In both of those cases Section 7407 as well as Section 7402(a) was cited as a basis for the injunction. In neither case was a bond posted, so the issue of whether Section 7402(a)

testor" cases are interpreted to permit courts to use Section 7402(a) as a basis for creating new substantive tax liabilities, then, together with the decision below, they may be viewed as a developing line of authority directly in conflict with this Court's decisions that restraint is to be used by the federal courts in the application of jurisdictional provisions.

2. The Decision of the Court of Appeals is Contrary to the Legislature's Remedial Plan

The decision of the Court of Appeals also conflicts with Congress' decisions as to the availability of injunctions against tax return preparers and advisers.

Prior to 1976, Congress had provided in the Internal Revenue Code for no civil remedies against persons other than taxpayers and, specifically, had enacted no civil legislation aimed at the control of those who assist or advise taxpayers in the preparation of tax returns. The focus had been on civil remedies against the taxpayers themselves rather than their advisers.

In 1976, in response to the government's request for limited authority to bring civil injunctive actions against those who assist taxpayers in preparing returns, Congress created a comprehensive civil legislative plan for the enforcement of the Code against persons other than taxpayers. In 1982 it enacted additional legislation broadening the areas in which non-taxpayers would be subject to civil remedies. In doing so, Congress did not authorize equitable relief in all instances. Instead, Congress specifically defined the limited circumstances in which the government could commence injunctive actions against persons who assist in tax return preparation. 26 U.S.C. § 7408 (1982).

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could be the basis for an injunction without the corresponding substantive authorization of Section 7407 did not need to be resolved.

The legislative history leaves no doubt that in enacting the 1976 and 1982 provisions applicable to non-taxpayers both Congress and the IRS recognized that Congress was enacting legislation civilly regulating tax return preparers and advisers for the first time. Although the jurisdictional provisions of Section 7402(a) had existed in essentially the same form for years,[5] the IRS and Congress recognized that Section 7402(a) could not be a source of duties for non-taxpayers. During the hearings on the 1976 legislation the IRS and the Department of the Treasury explicitly informed Congress that the reason they needed the new legislation was that the *only* remedies the IRS had at that time against tax return preparers, advisers, or others who assist taxpayers were the Internal Revenue Code's penalties for criminal conduct:

> "We are particularly interested in the civil penalty sanctions. . . . The only sanctions available under present law are the criminal provisions—principally Section 7206(2) of the Code—which make it a felony to willfully aid or assist in the preparation of a false or fraudulent return, and which impose fines of up to $5,000 and imprisonment of up to 3 years."

IRS Operations and Taxpayer Assistance: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 103-04 (1975) (written response of IRS to questions submitted by the Oversight Committee).

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[5] Section 7402(a) is essentially unchanged from Section 3800 of the 1939 Internal Revenue Code. Section 3800, I.R.C. 1939, codified existing revenue law and was derived from the Act of May 29, 1928, c.852, § 617(b), 45 Stat. 877. Provisions similar to those in Section 3800, I.R.C. 1939, were also contained in the Act of February 26, 1926, c.27, § 1122(b), 44 Stat. 121; the Act of June 2, 1924, c.235, § 1025(b), 43 Stat. 348; the Act of November 23, 1921, c.136, § 1310(b), 42 Stat. 310; and the Act of February 24, 1919, c.18, § 1318, 40 Stat. 1148.

Consistent with these representations, both the Senate and House Reports recognized that before the 1976 Act "the *only* sanctions available against such preparers are the criminal penalties of the tax law." S. Rep. No. 938—Part I, 94th Cong., 2d Sess. 350, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3779 (emphasis supplied); *see also* H. Rep. No. 658, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 2897. Congress described these criminal remedies as often "inappropriate, cumbersome, and ineffective deterrents because of the cost and length of time involved in trying these cases in court." S. Rep. No. 938—Part I, *supra*, at 350.

In 1982, when the government once again asked Congress to provide additional enforcement remedies to reach persons other than taxpayers, the Department of the Treasury once more specifically supported the government's request by urging that under current law (which included Section 7402(a)) there was no comparable injunctive authority:

> "We also think the injunctive rules are welcome, because under current law the IRS must wait until a taxpayer who has invested in the shelter has filed his tax return. In the meantime, the promoter may have proceeded to sell the shelter to others. We think that where the court finds that there is a likelihood of recurring conduct, an injunction may well be the *only* effective means of preventing promoters from organizing and selling new abusive tax shelters."

Tax Compliance Act of 1982 and Related Legislation: Hearing on H.R. 6300 Before the House Comm. on Ways and Means, 97th Cong., 2d Sess. 36 (1982) (written testimony of John E. Chapoton) (emphasis supplied).

Against this background and recognizing that no civil injunctive remedy against preparers or advisers existed, Congress both in 1976 and 1982 carefully and expressly considered how far the IRS' new enforcement power should extend. Congress determined expressly how a "pre-

parer" should be defined (26 U.S.C. § 7701(a)(36) (1982)) and that the remedies new in 1976 would *only* apply to persons meeting that definition. Congress determined what kinds of remedies—monetary penalties or injunctions—would be available against preparers and under what circumstances. Congress judged in 1982 that advisers would be subject to injunctions but only if involved in abusive tax shelters. 26 U.S.C. § 7408.

The result of the decision below is that Congress' careful choice of remedies and enforcement mechanisms has been expanded by judicial decree, and Congress' decision as to the availability of injunctions against particular persons but not others is effectively overturned. Under the Eleventh Circuit's ruling, advisers who were not involved enough in tax return preparation to meet the definition of "preparer" are subject to injunctions under Section 7402(a) on any ground deemed by a court to relate to "enforcement of the internal revenue laws." They are not protected by bonding provisions as are "preparers". Under the Court of Appeals decision, Congress' preferred administrative remedy against preparers is changed to an open-ended injunctive remedy for advisers, and Congress' decision *not* to extend injunctive authority over tax advisers (except in tax shelter cases) is overturned.[6]

Because it conflicts with the legislative plan, the decision of the Eleventh Circuit directly conflicts with decisions of this Court holding that federal courts may not interfere with a comprehensive remedial plan established by Congress.

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[6] In addition, the protection of the bond for many preparers will effectively be nullified because a preparer who does not sign a tax return can never be sure that he will meet the statutory definition of "preparer". Uncertain as to whether he is a preparer, he cannot be sure whether Section 7407 will apply—with its bonding protection—or whether instead he will be deemed an "adviser" and, therefore, subject to an injunction under Section 7402(a).

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), this Court held that a court could not fashion an additional remedy not specified by Congress in a comprehensive remedial statute. In rejecting the contention that federal courts could create an additional remedy of contribution under the Equal Pay Act, the Court held that:

> "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. *Cf. Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."

451 U.S. at 97; *see also Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111-13 (1974) (in admiralty the Court has declined to fashion new remedies where they may interfere with a legislative program); *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, 285-87 (1952) (rejecting claim for joint contribution between tortfeasors in area of law—maritime injuries—where Congress has comprehensively legislated).

Similarly, this Court held in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), that even in an area formerly governed by federal common law, once Congress has comprehensively legislated the courts may not add to or detract from the congressional statutory plan:

> "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts

> and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."

451 U.S. at 317; *see also Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

When Congress has legislated, the courts may not devise new remedies that are inconsistent with the statutory plan.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated: November 27, 1984

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the Court of Appeals
Dated July 6, 1984

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 83-8009

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ERNST & WHINNEY, a general partnership, *et al.*,
Defendants-Appellees.

July 6, 1984

Barbara V. Tinsley, Asst. U.S. Atty., Atlanta Ga., Glenn L. Archer, Jr., Asst. Atty. Gen., Tax Division, Michael L. Paup, Chief, Appellate Section, Richard Farber, Farley P. Katz, Tax Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellant.

Trammell E. Vickery, Atlanta, Ga., Daniel F. Kolb, Nancy Grunberg, Washington, D.C., for defendants-appellees.

Appeals from the United States District Court
for the Northern District of Georgia

Before HILL, VANCE and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

The United States filed this civil suit seeking to enjoin the accounting partnership Ernst & Whinney from actions allegedly interfering with the administration of Internal Revenue laws. The district court dismissed the action, finding that it lacked the power to issue an injunction pursuant to either 26 U.S.C.A. § 7402 (West 1967) or 26 U.S.C.A. § 7407 (Supp. 1983), the statutory provision pled by the United States. Because we conclude that each statutory provision could support the issuance of an injunction under certain of the facts alleged by the United States, we reverse and remand.

I. FACTUAL AND PROCEDURAL HISTORY

In March 1982, the government (hereinafter "IRS") filed a complaint against Ernst & Whinney and various individuals (collectively referred to as "Ernst") in the United States District Court for the Northern District of Georgia. Despite the fact that the record contains much dispute over the actions complained of by the IRS, we are bound to accept the complaint's allegations as true in reviewing the dismissal of the action. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 2492 n. 2, 53 L.Ed.2d 557 (1977).

The IRS claims focused on Ernst's promotion and use of a service designed to expand its client's ability to claim investment tax credits. The tax credit, 26 U.S.C.A. §§ 38, 46-48 (West 1967), allows a taxpayer to credit against its federal income tax liability a percentage (generally 10%) of the cost of "qualifying property." The principal types of property qualifying for this treatment are tangible personal property and other tangible property used as an integral part of various manufacturing and business

activities, but not including buildings and their structural components. 26 U.S.C.A. § 48(a).

According to the complaint, Ernst identifies a taxpayer potentially eligible for the credit (*e.g.*, a company constructing a new building) and approaches the party, making representations about possible tax savings through expanded use of the credit. If the party chooses to take Ernst's advice, consultants identify items of the property which are eligible for the credit and then obtain cost information about those items. A final study is then prepared, describing by specific terminology the items of property eligible for the credit and the associated costs.

The IRS contends that Ernst systematically develops misleading terminology for items not subject to the credit so as to improperly claim them as "qualifying property" within the statute.[1] The result is a possibly drastic overuse of the tax credit by claims on ineligible property and the employment of bogus descriptions that frustrate IRS attempts to discover the improper claims. To stop this abuse, the IRS sought to enjoin Ernst from (1) promoting its investment tax credit service; (2) advising clients to use deceptive terminology to claim a credit for property not clearly eligible; (3) creating misleading audit documentation in support of the bogus claims; and (4)

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[1] The complaint alleges various specific instances in which Ernst, by suggesting unusual terminology, advised clients to claim credit for property *clearly* not eligible for the investment tax credit. Allegations include, for example, that ineligible concrete block walls were referred to as "knock-out panels"; a section of a roof on a building was called an "equipment support"; fixed walls were denominated "movable partitions-gypsum"; and doors were called "movable partitions-wood." In other instances the terminological changes are alleged to have been used to qualify properties which are only arguably subject to the credit. In all cases, the unusual language is alleged to have hindered IRS attempts to discover claims for which there is either no basis or only questionable support.

hindering IRS attempts to discover the identities of taxpayers who use the Ernst service.[2]

The IRS pled two statutory provisions as support for its request that the court enjoin Ernst. The first, 26 U.S.C.A. § 7402(a) provides as follows:

> The district court of the United States, at the instance of the United States, shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the Internal Revenue laws.

The second provision, 26 U.S.C.A. § 7407, is part of a general scheme regulating the activities of "income tax return preparers" [3] and it allows injunctions to be issued

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[2] In a parallel development, the IRS issued, in March 1982, two "John Doe" summonses, 26 U.S.C.A. § 7609 (Supp. 1984), seeking records from Ernst concerning the clients who had utilized the tax credit service. Ernst complied with one summons and turned over records for clients in the "Southeast region" (Florida, Georgia, Alabama, Kentucky, Tennessee). The second summons, covering all clients outside the Southeast region, was not complied with. However, following an enforcement proceeding brought by the IRS, the United States District Court for the Northern District of Ohio ordered Ernst to comply. *United States v. Ernst & Whinney*, slip op. ——, —— F.Supp. —— (N.D. Ohio March 23, 1984), appeal filed.

[3] Whether or not Ernst is a "tax preparer" subject to § 7407 is a factual determination that has not yet been made by the district court. 26 U.S.C.A. § 7701(a)(36)(A) (Supp. 1983) defines "income tax return preparer" as "any person who prepares for compensation . . . any return of tax imposed by subtitle A" (*i.e.*, income tax). Regulations establish that a person who renders advice directly relevant to an entry that makes up a "substantial portion" of a return may be a "tax preparer." 26 C.F.R. 301.7701(15)(b)(1) (1983). That determination depends, however, on an individual examination of each return in question. Therefore, it is conceivable that Ernst may be a preparer on some returns and not on others.

for various offenses by "tax preparers." Section 7407(c) provides, however, that a "tax preparer" charged with conduct subject to penalties under §§ 6694-5 of the statute [4] can block an action for injunction by filing a $50,000 bond with the IRS as surety for the penalties.[5]

After the IRS initiated this lawsuit, Ernst filed the $50,000 bond provided for in § 7407(c). It then filed a motion to dismiss, arguing that the filing of bond barred any injunction against it as a "tax preparer" pursuant to § 7407, and that § 7402 did not give the court power to enjoin any other activities complained of.

The district court accepted Ernst's contentions and dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6). *United States v. Ernst & Whinney*, 549 F.Supp. 1303 (N.D.Ga.1982). The court found it unnecessary to resolve the factual issue of whether Ernst was acting in the capacity of a "tax preparer" subject to § 7407 remedies, or whether Ernst was merely acting as a "tax adviser" [6] and thus not subject to the statutory regulation of preparers. To the extent that Ernst was acting as a "tax preparer," the court below found that the conduct alleged by the IRS was subsumed within the cate-

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[4] 26 U.S.C. § 6694 (Supp. 1983) assesses penalties for the understatement by a preparer of a taxpayer's liability. A preparer who understates liability due to a negligent or intentional disregard of rules and regulations may be assessed a penalty of $100 for each return. A preparer who willfully understates a taxpayer's liability shall be fined $500 for each affected return. 26 U.S.C.A. § 6695 (Supp. 1983) assesses additional penalties against preparers who fail to identify themselves on returns or fail to keep sufficient records.

[5] The specific provisions of § 7407 are discussed more fully below, particularly at § III, *infra*.

[6] "Tax adviser" is not a statutory term, but we use it to denote the function of Ernst in situations where it is not a "return preparer." *See United States v. Ernst & Whinney*, 549 F.Supp. at 1309.

gory of "penalty conduct" for which the filing of a bond would preclude an action for injunction. Because the company had filed the bond, the court concluded that Ernst was no longer subject to injunction. 549 F.Supp. at 1306-09. The district court also found itself without authority to enjoin activities of Ernst which might have been taken in its capacity as a "tax adviser." In this regard, the court held that § 7402 did not, by itself, allow for an injunction in the absence of an allegation that Ernst had breached a specific statutory duty imposed by a substantive provision of the Internal Revenue Code. *Id.* at 1311. The IRS brings this appeal.[7]

We discuss first the availability of the injunctive remedy with respect to activities which Ernst may have undertaken as a "tax adviser," concluding that § 7402 does empower district courts to enjoin such activities. Then we discuss activities which Ernst may have conducted as a "tax preparer," concluding that some activities fall within the "penalty conduct" category shielded from injunction by virtue of the § 7407(c) bond provision, but also concluding that some alleged activity may fall outside the "penalty conduct" category. The latter activities would thus be subject to the § 7407 injunctive remedy notwithstanding the filing of a bond.

II. ERNST AS A "TAX ADVISER"

We first consider the operation of § 7402(a) as it supports injunctive relief against activities not falling within the provisions regulating tax preparers. 26 U.S.C.A. § 7402(a) gives district courts the jurisdiction to issue injunctions in civil actions "as may be necessary or appropriate for the enforcement of the Internal Revenue laws." In this case, the government filed a civil suit

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[7] In addition to the briefs, each party submitted post-argument letters pursuant to Fed.R.App.P. 28(j). We have considered those letters.

seeking an injunction against an alleged interference with tax enforcement. Thus, at a first glance, the government's suit seems to fit precisely within the statutory provision.

Ernst argues, however, that § 7402(a) is merely a jurisdictional statute and that the enumerated remedies cannot be invoked against it unless the government proves that Ernst has itself violated some specific tax provision by its advising activities. The district court found no "requisite underlying Code section [that creates] some duty on the part of the defendant sought to be enjoined." 549 F.Supp. at 1311. Because of the lack of a specific duty, the district court held that no injunction could issue under § 7402(a).

We reject the district court's narrow construction of § 7402(a) and hold that there need not be a showing that a party has violated a particular Internal Revenue Code section in order for an injunction to issue. The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws. *See United States v. First National Bank*, 568 F.2d 853, 855-56 (2d Cir. 1977); *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957). It has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute. *See United States v. Ekblad*, 732 F.2d 562 (7th Cir. 1984) (§ 7402 used to enjoin individual's harassment of IRS agents designed to hinder their effectiveness); *United States v. Hart*, 701 F.2d 749 (8th Cir. 1983) (same); *United States v. VanDyke*, 568 F.Supp. 820 (D. Or. 1983) (same).[8] Furthermore, the statute has been relied upon

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[8] The district court relief principally on *United States v. Mobil Corp.*, 543 F.Supp. 507 (N.D. Tex. 1981), in holding that § 7402(a) would not authorize an injunction in the absence of a specific statutory violation. In *Mobil*, the district court denied the IRS's request for an injunction commanding inspection of records because Con-

to enjoin activities of third parties that encourage taxpayers to make fraudulent claims. *United States v. Landsberger*, 692 F.2d 501 (8th Cir. 1982); *United States v. May*, 555 F.Supp. 1008 (E.D. Mich. 1983).[9] These cases demonstrate that § 1402(a) does give the district court the power to enjoin Ernst's activities as a tax adviser.[10]

Of course, our legal conclusion is no indication of the propriety of injunctive relief against Ernst in the instant case. In addition to factual disputes that must be re-

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gress had provided an administrative proceeding to serve precisely that purpose. In discussing § 7402(a), the court stated

> That statute gives this court jurisdiction to order compliance with other Code provisions, including § 6001. It does not itself create a right to inspect.

543 F.Supp. at 519. The district court's conclusion that § 7402(a) creates no right to inspect is clearly correct in light of congressional intent that IRS inspection be carried out pursuant to 26 U.S.C.A. § 7602 *et seq.*, with the procedural safeguards therein provided. That conclusion does not govern this case in which there is no analogous administrative procedure. To the extent that *Mobil* may imply that § 7402(a) is only available to order compliance with other Code sections, we expressly disagree.

[9] In both *Landsberger* and *May*, the government sought injunctions based on either § 7402(a) or § 7407. Each court found that either provision would support an injunction, thereby obviating the need to determine whether the individual in the case was a "return preparer."

[10] Ernst cites various cases for the proposition that the United States has no general right to obtain an injunction barring "interference." *United States v. Philadelphia*, 644 F.2d 187 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). These cases are inapposite because they each involved attempts by the United States to seek injunctions *on behalf of third parties* (*e.g.*, mental patients or victims of discrimination), rather than efforts by the government to protect its own interests. Here, there is an obligation on the part of the IRS to enforce the tax laws, 26 U.S.C.A. § 7402, and this injunctive action is brought in the performance of that obligation.

solved, the decision to issue an injunction under § 7402 (a) is governed by the traditional factors shaping the district court's use of the equitable remedy. *See, e.g., Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 591-592, 88 L.Ed. 754 (1944) (court reviews statute allowing injunctions to stop violation of Emergency Price Control Act, concludes that simple grant of injunctive remedy "affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect."); *S.E.C. v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982) (equitable factors considered in determining whether injunction should issue pursuant to statute generally authorizing injunctive relief to prohibit violations of security laws); *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971) (writ *ne exeat republica* authorized by § 7402(a) must only be issued in extraordinary cases as dictated by common law) (Stevens, J.); *United States v. Robbins*, 235 F.Supp. 353, 357 (E.D. Ark. 1964) (same). *See also*, 11 C. Wright & A. Miller, *Federal Practice and Procedures* § 2942 (1973) (general discussion of equitable principles governing injunctive remedy).[11] While those factors may

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[11] Foremost among the principles governing the use of the injunctive remedy is the traditional requirement "that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971); *O'Hair v. Hill*, 641 F.2d 307, 310 (5th Cir. 1981). In determining whether the IRS is entitled to an injunction in this case, it will be necessary for the district court to examine the extent to which its interests are protected by available legal remedies. *See, e.g.*, 26 U.S.C.A. § 7602 *et seq.* (West 1967 & Supp. 1984) (provision of summons proceeding by which IRS can obtain documents in course of tax investigation); 26 U.S.C.A. § 6701 (Supp. 1984) (establishing penalty for "*any person* who aids or assists in, procures, or advises with respect to, the preparation of any portion of a return, affidavit, claim or other document in connection with any matter arising under the internal revenue

or may not support the eventual issuance of an injunction, they do not affect the inherent power of the district court to issue it.

The court's 12(b)(6) dismissal of the action against Ernst as tax adviser was, therefore, improper.[12]

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laws" who knows that his advice will be used to understate tax liability) (emphasis added).

[12] Ernst advances two additional arguments: (1) that the absence of discussion of § 7402(a) in the legislative history of the tax preparer provisions indicates that Congress did not believe that any such injunction was possible absent a specific statutory violation, and (2) that, by choosing only to regulate tax preparers under § 7407, Congress evidenced an intent not to regulate tax advisers. Neither argument is persuasive.

While the legislative history of the 1976 tax preparer laws contains no discussion of § 7402(a) and indicates that Congress did not consider § 7402(a) as providing a remedy against tax preparers, we note that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance,'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001 (1968). Moreover, discussion of § 7402(a) by the 97th Congress in passing the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248, demonstrates congressional awareness of the injunctive provision's breadth. The legislative history of the 1982 Act notes that § 7402 injunction is additional to the tax preparer injunction, recognizes "the great latitude inherent in [§ 7402] equity jurisdiction to fashion appropriate equitable relief," and states, citing *United States v. Landsberger*, that the district court can "enjoin any action to impede proper administration of the tax law or any action which violates criminal statutes." *See* Senate Finance Committee, Tax Equity and Fiscal Responsibility Act of 1982, S. Rep. No. 494, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Adm. News pp. 781, 1016-17.

Furthermore, Congress intended the tax preparer regulations to be cumulative. Section 7407(c) recognizes that the injunctive action against a tax preparer is meant to be "separate and apart from any other action brought by the United States against such income tax preparer or any taxpayer." The intent that § 7407 be just one weapon in the arsenal against tax preparer abuses does not suggest any intent to deprive the IRS of power to regulate activities not covered by the tax preparer statutes.

III. ERNST AS A "TAX PREPARER"

We consider next the availability of injunctive relief as against activities that might on remand be classified as those of a tax preparer. 26 U.S.C.A. § 7407 was enacted as part of the Tax Reform Act of 1976. H.R. 10612, 94th Cong., 2d Sess. (1976), U.S. Code Cong. & Admin. News 1976, p. 2897. It, and other contemporaneous provisions regulating the activities of tax preparers, reflects congressional concern over various abuses by preparers in the reporting of clients' income tax liabilities. Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., General Explanation of the Revenue Act of 1976, p. 346 (Comm. print 1976). In addition to provisions aimed at curbing such abuses, the 1976 enactment also created various disclosure requirements aimed at providing the IRS with information about which returns have been worked on by professional preparers. *See* 26 U.S.C.A. §§ 6109(a)(4), 6695(c) (West 1980). This disclosure better enables the government to recognize and correct the practices forbidden by the Act.

In reviewing the district court's conclusion that § 7407 could not support an injunction in the present case, we will discuss (1) the remedial framework created by § 7407; and (2) the effect of Ernst's filing a § 7407(c) bond upon the action for injunction.

A. *Section 7407:* The statute outlining a specific action for injunction against tax preparers has received little judicial treatment to this date. We therefore discuss, at some length, the specific provisions of that statute.

Section 7407(a) allows the Secretary to commence a civil action in the district court "to enjoin any person who is an income tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as an income tax return preparer." The section acknowledges that district court jurisdiction is pursuant to the jurisdictional grant contained in § 7402

(a) and specifically states that an action under § 7407 is "separate and apart" from any other action brought by the IRS against the preparer in question.[13]

Section 7407(b) sets out the general activities to be enjoined. It provides as follows:

> (b) Adjudication and decrees.—In any action under subsection (a), if the court finds—
>
> (1) that an income tax return preparer has—
>
> (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,
>
> (B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as an income tax return preparer,
>
> (C) guaranteed the payment of any tax refund or the allowance of any tax credit, or
>
> (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and
>
> (2) that injunctive relief is appropriate to prevent the recurrence of such conduct,
>
> the court may enjoin such person from further engaging in such conduct. If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would

[13] Section 7407(a) also specifies venue, which is not an issue in this case.

> not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.

Thus, in order to issue an injunction pursuant to § 7407, three prerequisites must be met: first, the defendant must be a tax preparer; second, the conduct complained of must fall within one of the four areas of proscribed conduct, § 7407(b)(1); and third, the court must find that an injunction is "appropriate to prevent the recurrence" of the proscribed conduct, § 7407(b)(2).

The final section of the statute, § 7407(c), provides as follows:

> No action to enjoin under subsection (b)(1)(A) shall be commenced or pursued with respect to any income tax return preparer who files and maintains, with the Secretary in the internal revenue district in which is located such preparer's legal residence or principal place of business, a bond in the sum of $50,000 as surety for the payment of penalties under section 6694 and 6695.

Thus, a preparer may block an injunctive action by filing the requisite bond, but only if the behavior sought to be enjoined is "penalty conduct" within the meaning of § 7407(b)(1)(A).

In the instant case, Ernst filed the statutory bond shortly after the initiation of the lawsuit. It claims that the IRS complaint essentially alleges penalty conduct and that the bond therefore terminates any right to injunction under § 7407. We now examine that contention.

B. *The Effect of Ernst's § 7407(c) Bond:* In its complaint, the IRS sought injunctive relief against various

activities.[14] The question before the court is which, if any, of the activities are penalty conduct as defined by 26 U.S.C.A. §§ 6694-5, such that Ernst's bond prevents the court from enjoining that conduct under § 7407.

Section 6694 sets forth two kinds of penalty conduct.

> (a) Negligent or intentional disregard of rules and regulations.—If any part of any understatement of liability with respect to any return or claim for refund is due to the negligent or intentional disregard of rules and regulations by any person who is an income tax return preparer with respect to such return or claim, such person shall pay a penalty of $100 with respect to such return or claim.
>
> (b) Willful understatement of liability.—If any part of any understatement of liability with respect to any return or claim for refund is due to a willful attempt in any manner to understate the liability for a tax by a person who is an income tax return preparer with respect to such return or claim, such person shall pay a penalty of $500 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

Section 6695 defines as penalty conduct various violations of the disclosure and record-keeping provisions of the statute.

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[14] As explained in the statement of facts, the IRS seeks to enjoin Ernst from promoting its investment tax credit service, advising clients to use deceptive terminology to make improper claims, and creating false documentations to support those claims. The IRS also sought to enjoin Ernst from hindering its efforts to discover which taxpayers used the tax credit service. This issue has been litigated separately. *See supra* note 2.

Ernst argues that the complaint alleges a pattern of activity designed to understate tax liability. Encouraging clients to take unwarranted investment tax credits would amount to a "willful understatement" and thus apparently fits within the category of activity for which the filing of a $50,000 bond will block injunctive action. In support of its argument, Ernst notes that the IRS is bringing penalty actions under § 6694 against it in cases in which audits have uncovered the bogus terminology.

The IRS argues, with some subtlety, that the conduct alleged is not simply penalty conduct. While the government does not dispute that it is proceeding against Ernst under § 6694 for some returns, it characterizes the complaint as alleging a broad pattern of deception and falsification that is actually proscribed by § 7407(b)(1)(D) ("any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue Laws"). Since the bond bars injunctive relief only with respect to subsection (A) penalty conduct and not with respect to subsection (D) conduct, the IRS seeks to avoid the bar in this manner. The IRS describes its concern that numerous undiscovered returns may evade scrutiny because of their misleading terminology. Thus, because the gist of the complaint is falsification and deception rather than understatement, the IRS contends that the filing of bond does not block the request for injunctive relief.

The district court, ruling for Ernst, found that "all the activities charges ultimately have the same goal, the understatement of tax liability." 549 F.Supp. at 1308. It rejected the government's argument as an awkward attempt to divide up activity that, considered as a whole, clearly is subject to the bonding provision.

We find the district court's decision generally correct. However, unlike the court below or the parties on appeal, we do not believe that the issue is appropriately con-

sidered as an "all or nothing" proposition. Rather, within the context of a complicated complaint and request for injunctive relief against various activities, we find the bonding provision applicable to some, but not necessarily all, of the activities alleged in this action. We examine each type of conduct in the complaint to determine whether it is penalty conduct.

1. The IRS requests an injunction against Ernst's advising clients to make unjustified tax credit claims by means of receptive terminology. The district court correctly ruled that this activity is so limited to the goal of understating tax liability that it must necessarily fall within § 6694 penalty conduct.

The legislative history of § 6694 gives examples of "willful understatements" that support the district court's decision.

> For example, if a taxpayer states to the return preparer that he has only two dependents, and the preparer, with full knowledge of that statement, reports six dependents on the tax return, a willful attempt to understate tax liability has occurred. A willful attempt also occurs generally where an income tax return preparer disregards certain items of income given to him by the taxpayer or other persons. . . . A willful understatement of tax liability can also include an intentional disregard of rules and regulations. For example, an income tax return preparer who deducts all of a taxpayer's medical expenses, intentionally disregarding the percent of adjusted gross income limitation, may have both intentionally disregarded rules and regulations and willfully understated tax liability.

Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., General Explanation of the Revenue Act of 1976, p. 352 (Comm. print 1976) U.S. Code Cong. & Admin. News 1976, pp. 2897, 3248. These examples deal with false-

hoods knowingly perpetrated by a return preparer—false factual information (number of dependents; reported income) or false legal claims (entitlement to full medical deduction)—to reduce a client's tax liability. While we can perceive some difference in a situation where terminology is manipulated to support an improper claim, that difference is not significant enough to justify a conclusion that Ernst's alleged activities in advising clients is other than "willful understatement." Referring to a door (nonqualified property) as a "movable partition" is much like claiming six dependents instead of two. Claiming an investment tax credit on property certainly or arguably ineligible is similar to claiming a full medical deduction when the governing law only allows a partial claim. The type of falsehoods and deceptions alleged by the IRS in this case are within the realm of "willful understatement" proscribed by 26 U.S.C.A. § 6694(b).[15]

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[15] The IRS believes that the kind of deception alleged is significantly different because Ernst attempts to cover up the understatement via use of misleading terms, thereby rendering the understatements more difficult to discover. We would be reluctant to draw a line between two types of willful understatement based upon how ingenious the perpetrator is in trying to get away with his deception. Furthermore, Congress did foresee that activities violating § 6694(b) might be fraudulent in such a manner as to thwart IRS detection. Unlike violations of § 6694(a) (negligent understatements), which have a three-year statute of limitations, there is *no* statute of limitations for prosecuting violations of § 6694(b). 26 U.S.C.A. § 6696(d) (Supp. 1983). The existence of alternate means by which the IRS can discover whether taxpayers have used the complained of service, *see* 26 U.S.C.A. §§ 7602, 7609, minimizes any fear that bogus claims will avoid governmental scrutiny.

The IRS further argues that this result, essentially accepting the district court's ruling that the "ultimate goal" of the alleged deception is understatement, would render meaningless the language of § 7407(b)(1)(D), because no "other fraudulent or deceptive conduct" could be imagined that did not have the ultimate goal of reducing taxes. This is an inaccurate reading of the statute. For example, both ¶¶ (B) and (C) of the statute allow injunctions against particular conduct by tax preparers which may or may not be related to countenancing understatement of tax liability. Mis-

2. Having decided that advising clients how to make deceptive claims for investment tax credits would be penalty conduct for which the § 7407(c) bond would bar injunctive relief, we also conclude that misleading documentation created by Ernst in the course of that advising is, similarly, too closely related to the "willful understatement" to be separated out and enjoined. Within the scheme created by § 7407, such activity is also penalty conduct.[16]

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representing one's education or experience, proscribed in ¶ (B), or guaranteeing a tax refund or credit to a client, proscribed in ¶ (C), may be enjoined whether or not reducing taxes is shown as the motive. These provisions demonstrate that the return preparer statutes are concerned with regulating preparer activities vis a vis their clients as well as protecting the public fisc. Therefore, even given a broad definition of "penalty conduct" under § 7407(b)(1)(A), the general category of activity proscribed in (D) retains independent validity by forbidding activity akin to that proscribed by (B) and (C) as illustrated by the text below. *See also* Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., General Explanation of the Revenue Act of 1976, p. 355 (Comm. print. 1976) U.S. Code Cong. & Admin. News 1976, pp. 2897, 3251 (describing activities proscribed by (D) as "similar in nature to the above types of conduct").

[16] The fact that a § 7407 injunction is not available as against certain activities by reason of the bond filing does not indicate a complete lack of remedies for such behavior. The IRS has the ability to seek taxpayer records from Ernst, 26 U.S.C.A. §§ 7602, 7609, compel disclosure, 26 U.S.C.A. § 7604, and ultimately assess penalties against Ernst for preparing improper returns. 26 U.S.C.A. §§ 6694-5. In addition, criminal penalties are available against any party who assists in the preparation of a false or fraudulent tax return. 26 U.S.C.A. § 7206 (1967). Finally, a statute recently enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 authorizes significant *civil* penalties against any person (including tax preparers) assisting in the preparation of a false or fraudulent tax claim. 26 U.S.C.A. § 6701. These penalties may be imposed in lieu of the less onerous tax preparer penalties, 26 U.S.C.A. § 6701(f)(2). Unlike the tax preparer statutes, the new enactment does not provide a bonding provision as a shield against injunctive relief. Our notation of the foregoing alternative remedies, of course, expresses no opinion with respect to the manner or scope of their application.

3. While the IRS request for injunction to stop such penalty conduct cannot be enjoined under § 7407 because of the bond filing, the IRS has also requested an injunction to stop Ernst from promoting and marketing its allegedly fraudulent investment tax credit service. The facts alleged by the IRS may, if proved, entitle it to an injunction of such activity.

In promoting its service, Ernst approaches parties who have property subject to some legitimate investment tax credit. It apparently gives those parties advertising material suggesting that it can help them claim more of a credit than that allowed under "traditional methods" of claiming property. The IRS, of course, argues that the new method actually utilized is fraudulent.

Section 7407(b)(1)(C) allows the court to enjoin return preparers who "guarantee the payment of any tax credit." Many taxpayers are, of course, legitimately entitled to refunds and credits. The particular provision, however, recognizes that certain promotional schemes may facilitate fraudulent preparation of taxpayer returns. For this reason, injunctive relief is appropriate.[17]

There is no direct allegation here that Ernst "guaranteed" clients a specific level of tax credit. However, the facts alleged do suggest the possibility that the illegal scheme was aggressively marketed to taxpayers by discussing the potential savings over "traditional methods" of tax accounting. If this aggressive marketing scheme

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[17] Injunction is appropriate even though an ultimate concern with "preparer guarantees" is the possible understatement of tax liability. Unlike activities incident to the preparation of particular returns, however (*e.g.*, advising clients or creating false documentation), the improper promotional techniques are deemed separate from penalty conduct, as regulated by § 6694, and thus can be enjoined regardless of whether a preparer files bond. This reflects a congressional judgment that such activities are to be stopped regardless of the possibility that resulting tax returns may later be subject to penalty proceedings.

was coupled with Ernst's knowledge that the claims to be made were arguably improper, the situation would be little different than a preparer promising potential clients a tax refund. While such activity would not fall neatly within § 7407(b)(1)(C), it could properly be enjoined under the general language of § 7407(b)(1)(D).

We do not here indicate any opinion as to whether such an injunction is warranted against Ernst's promotional activities. The complaint, however, alleges a pattern of activity which, if proven, could support partial injunctive relief under (D) despite Ernst's filing of bond. It was therefore error for the district court to conclude that the bond raised an "insuperable bar" to the injunction against Ernst as a tax preparer. 549 F.Supp. at 1309. While that bar does preclude a § 7407 injunction against advising clients or creating documentation in the course of such advice, improper promotional activities may still be enjoined.

IV. CONCLUSION

For the foregoing reasons, we reverse the district court's dismissal of this action. To the extent that Ernst is found on remand to be a tax adviser, the district court has power under 26 U.S.C.A. § 7402(a) to enjoin conduct by it which hinders the enforcement of the Internal Revenue laws. Such power must be exercised in light of the traditional principles governing the use of the equitable remedy. On the other hand, to the extent that Ernst is a tax preparer, the filing of a § 7407(c) bond does bar injunctive relief against any penalty conduct. However, Ernst's promotion of its investment tax credit service may be enjoined under § 7407(b)(1)(D) if the IRS allegations prove true and the showing required by § 7407 is made.

REVERSED and REMANDED.

Opinion of the District Court
Dated November 2, 1982

UNITED STATES DISTRICT COURT,
N.D. GEORGIA,
ATLANTA DIVISION.

Civ. A. No. C82-501A

UNITED STATES OF AMERICA,
Plaintiff,

v.

ERNST & WHINNEY, *et al.*,
Defendants.

Nov. 2, 1982

James E. Baker, U.S. Atty., Atlanta, Ga., for plaintiff.

Trammell E. Vickery, Hansell, Post, Brandon & Dorsey, Atlanta, Ga., Daniel F. Kolb, Davis Polk & Wardwell, Washington, D.C., for defendants.

ORDER

ROBERT H. HALL, District Judge.

This action was brought by the United States to enjoin the accounting firm of Ernst & Whinney ("E & W") and various agents and employees in its Atlanta, Georgia office from engaging in allegedly deceptive conduct in the preparation of federal income tax returns. The case is presently before the court on defendants' motion to dis-

miss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

FACTS

The substance of the action by the government centers around a service offered by E & W known as an Investment Tax Credit Study ("ITC Study"). E & W's promotional literature describes the purpose of the ITC Study to be realization of the full advantage of the investment tax credit provided for by Section 38 and 46-48 of the Internal Revenue Code of 1954 and the underlying Treasury Regulations.

Generally, the investment tax credit permits a taxpayer to credit against any federal income tax owed, 10 percent of the cost of qualifying property. Buildings and their structural components do not qualify for the credit. *See* 26 U.S.C. §§ 36, 46, 48; 26 C.F.R. §§ 1.38-1, 1.48-1. However, the government has alleged that E & W is misclassifying property that is clearly unqualified for the investment tax credit so as to appear on the taxpayer's books and records supporting its tax returns as qualifying property. Further, the government has charged that E & W is classifying tangible property, the nature of which is subject to different legal interpretations, by using misleading terminology designed to avoid having the property identified on the taxpayer's books as a questionable item. Finally, the government has alleged that E & W has failed to maintain or provide to their clients documentation sufficient to identify the specific cost components of the amounts claimed for the investment tax credit.

Arguing that these practices constitute deceptive, misleading, and obstructive conduct which substantially interferes with the proper administration of the internal revenue laws, the government seeks an injunction pursuant to 26 U.S.C. § 7407, or alternatively, 26 U.S.C. § 7402(a). The language, structure, and history of these two statutes

are crucial to the determination of the present motion. Section 7407 provides:

> § 7407. Action to enjoin income tax return preparers
>
> (a) Authority to seek injunction—Except as provided in subsection (c), a civil action in the name of the United States to enjoin any person who is an income tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as an income tax return preparer may be commenced at the request of the Secretary. Any action under this section shall be brought in the District Court of the United States for the district in which the income tax preparer resides or has his principal place of business or in which the taxpayer with respect to whose income tax return the action is brought resides. The court may exercise its jurisdiction over such action (as provided in section 7402 (a)) separate and apart from any other action brought by the United States against such income tax preparer or any taxpayer.
>
> (b) Adjudication and decrees.—In any action under subsection (a), if the court finds—
>
> (1) that an income tax return preparer has—
>
> (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,
>
> (B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as an income tax return preparer,
>
> (C) guaranteed the payment of any tax refund or the allowance of any tax credit, or
>
> (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin such person from further engaging in such conduct. If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.

(c) Bond to stay injunction.—No action to enjoin under subsection (b)(1)(A) shall be commenced or pursued with respect to any income tax return preparer who files and maintains, with the Secretary in the internal revenue district in which is located such preparer's legal residence or principal place of business, a bond in a sum of $50,000 as surety for the payment of penalties under sections 6694 and 6695.

Section 7402(a) provides:

§ 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments.—The district court of the United States at the instance of the United States shall have such jurisdicion to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

On its motion to dismiss, E & W argues vigorously that the government is not entitled to the injunction it seeks

under either of these statutes. E & W argues that insofar as it is an income tax preparer, its posting of the bond provided for under § 7407(c) precludes the government's action for an injunction under § 7407. Second, it argues that insofar as it is not a preparer, no injunction can be sought under § 7402(a) because there is no substantive Code section to support such an action. These contentions and those of the government in opposition will be addressed more fully below.

DISCUSSION

1. Characterization of the motion to dismiss

The motion to dismiss by E & W has been asserted under both Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Although the motion could arguably be grounded upon either of these rules, the court has determined that it is more appropriately characterized as a 12(b)(6) motion. The government has asserted that this court has jurisdiction pursuant to both 28 U.S.C. § 1340 and § 1345. Section 1340 confers jurisdiction over "any civil action arising under any Act of Congress providing for internal revenue . . ." Section 1345 provides that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . ." In this action either statute gives this court jurisdiction. Since the government brought the action under § 7407 and 7402(a) of the Internal Revenue Code, § 1340 confers jurisdiction. Similarly, jurisdiction exists under § 1345 since the United States brought the action.

Although Rule 12(b)(6) may not apply perfectly to the instant motion, it seems more appropriate than 12(b)(1). A complaint is not to be dismissed under 12(b)(6) unless it apears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations. The rule precludes dismissal except in

the extraordinary case in which it appears from the complaint that there is some insurperable bar to relief. *See United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547, 549 & n. 1 (5th Cir. 1980). The controversy before the court on this motion seems to be just this: whether there is indeed some insuperable bar to relief. Accordingly, the motion will be treated as one pursuant to 12(b)(6) and the complaint must therefore be liberally construed in the light most favorable to the government and its allegations taken as true.

2. The statutes involved

Section 7407 was enacted as part of the Tax Reform Act of 1976, Pub.L.No. 94-455. It grants the Secretary of Treasury the power to seek an injunction in any district court prohibiting an income tax return preparer from engaging in specific practices or from acting as a preparer. The injunction may be sought against a preparer's (1) engaging in conduct subject to penalty under section 6694 or 6695 or subject to any criminal penalty, (2) misrepresenting his eligibility to practice before the IRS, experience, or education, (3) guaranteeing the payment of any tax refund or the allowance of any tax credit, or (4) engaging in any other fraudulent or deceptive conduct which substantially interferes with the internal revenue laws. However, § 7407(c) provides that the preparer can preclude an injunction action pursuant to § 7407 (b)(1)(A) relating to conduct subject to penalty by filing a bond of $50,000 as surety for the payment of penalties.

The other statute under which the government seeks an injunction, § 7402(a), is much more general than § 7407. Enacted a decade before § 7407, § 7402(a) gives the district courts jurisdiction to issue injunctions, *inter alia*, to enforce the internal revenue laws. It also provides that the "[r]emedies hereby provided are in addition to and not exclusive of any and all other remedies . . . to enforce such laws."

3. E & W as an income tax return preparer

E & W's argument is that insofar as it is acting as an income tax return preparer,[1] its filing of the requisite bond under § 7407(c)[2] precludes an injunction against it pursuant to § 7407(a). The success of this argument depends on whether the acts alleged in the complaint can fairly be characterized as conduct subject to penalty within the meaning of § 7407(b)(1)(A).

Section 7407(b)(1)(A) concerns conduct subject to penalty under §§ 6694 or 6695, or to any criminal penalty. Only the more expansive civil penalty sections, added at the same time as the injunctive provisions of § 7407, are important here. Section 6694 provides in pertinent part:

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[1] An income tax return preparer is defined as "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A." The preparation of a "substantial portion" of a return or claim for refund is sufficient under the statute. 26 U.S.C. § 7701(a)(36)(A).

The Treasury Regulations relating to this definition reiterate that only those who prepare all or a substantial portion of a return or claim for refund are to be considered preparers. However, the regulations provide that the rendering of advice directly relevant to the determination of the existence, characterization, or amount of an entry will be regarded as preparation of that entry. 26 C.F.R. § 301.7701-15(b)(1). Thus, this sort of "advising" would seem to render a person a preparer if the advice related to a substantial portion of the return.

Finally, the regulations provide that what is a "substantial portion" is determined by comparing the length and complexity of and the tax liability or refund involved in that portion to that of the return or claim for refund as a whole. *Id.*

[2] It is undisputed that E & W has filed the requisite bond under § 7407(c). Although technically outside of the complaint, the court feels justified in considering this factor on E & W's 12(b)(6) motion to dismiss. The complaint itself triggered the filing of the bond and consideration of this fact is necessary to give effect to the applicable law.

§ 6694. Understatement of taxpayer's liability by income tax return preparer

(a) Negligent or intentional disregard of rules and regulations.—If any part of any understatement of liability with respect to any return or claim for refund is due to the negligent or intentional disregard of rules and regulations by any person who is an income tax return preparer with respect to such return or claim, such person shall pay a penalty of $100 with respect to such return or claim.

(b) Willful understatement of liability.—If any part of any understatement of liability with respect to any return or claim for refund is due to a willful attempt in any manner to understate the liability for a tax by a person who is an income tax return preparer with respect to such return or claim, such person shall pay a penalty of $500 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

* * * *

(e) Understatement of liability defined.—For purposes of this section, the term "understatement of liability" means any understatement of the net amount payable with respect to any tax imposed by subtitle A or any overstatement of the net amount creditable or refundable with respect to any such tax. Except as otherwise provided in subsection (d), the determination of whether or not there is an understatement of liability shall be made without regard to any administrative or judicial action involving the taxpayer.

Section 6695, providing penalties for such conduct as failing to furnish a copy of the return prepared to the tax-

payer and failing to sign the return, has no application to this action.

Thus, the court's task is to determine whether the acts alleged by the government constitute "negligent or intentional disregard of rules and regulations" or "a willful attempt in any manner to understate the liability for a tax." The complaint seeks to enjoin three practices. First, it is alleged that E & W is "engaging in a pattern and practice of misclassifying property, which is clearly unqualified for the investment tax credit, so as to appear on a taxpayer's books and records supporting its tax returns as property seemingly qualifying for the investment tax credit." Complaint, ¶ 18.[3] The second alleged practice is described as "classifying tangible property, the nature of which is subject to different legal views or conflicting legal authority, by using misleading and deceptive terminology and nomenclature intentionally designed to avoid having the property identifiable on the taxpayers' books and records as a questionable item." Complaint, ¶ 19.[4] Finally, E & W is alleged to have "failed to maintain, or to provide to their clients, documentation sufficient to identify the specific cost components of the amounts claimed for the investment tax credit." This, the government alleges, makes it impossible for the IRS to substantiate a correct cost basis for the property even where questionable claims have been identified. Complaint, ¶ 20.

The government concedes that at least some of the acts alleged fall within § 6694. However, it argues vigorously

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[3] Examples of this misclassification conduct cited in the complaint include describing an entrance canopy constructed of heavy timbers as "trellis work," and referring to an interior brick and masonry shrubbery area as "interior portable planters." Complaint, ¶ 18 A. & B.

[4] Examples of this practice include describing shopping mall signs as "identifying devices," and denominating portions of streets and parking lots as "transportation and equipment accessway" and "truck accessway." Complaint, ¶ 19 B. & C.

that some of the acts alleged are outside § 6694 and thus within § 7407(b)(1)(D) dealing with other fraudulent or deceptive conduct" substantially interfering with the internal revenue laws. Examples cited include: 1) using arcane and obscure terms to describe components claims for the investment tax credit, 2) creating a muddled or broken audit trail, and 3) manipulating taxpayer correspondence, contractor's cost estimates and architect's blueprints to support manufactured claims. These practices combine to make the items undetectable or unauditable.

Despite the government's effort to find some conduct not covered by 7407(b)(1)(A), the court believes that even these activities are subject to penalty under § 6694. Indeed, all the activities charged ultimately have the same goal, the understatement of tax liability. Achieving this goal in today's sophisticated world may require sophisticated techniques, such as creating a broken audit trail and manipulating underlying records. These activities, however, are merely steps necessary to the ultimate goal of understating liability. Indeed, they would make little sense without this goal.

To do as the government asks, and separate out these steps which do not in themselves directly involve the understatement of liability would effectively nullify § 7407(c) enabling the filing of a bond to stay the injunction action. Only an injunction as to the actual entering of the items on the return would be stayed by the filing of a bond, while the injunction action would proceed against the preparatory activities and post-understatement cover-up. The court does not believe that Congress intended this awkward division, but rather that it viewed the scheme to understate liability as a whole which the filing of a bond would relegate to a penalty proceeding.

Although the court has decided that the filing of the bond by E & W must stay the injunction proceeding insofar as it has acted as a preparer primarily on the

basis of the language of the statutes themselves,[5] the court also believes that the penalty process is more appropriate for the resolution of the complicated issues involved. This process involves an initial investigation before any penalty is proposed. The preparer is notified of the proposed penalty and given an opportunity to prevent its assessment. Several officials review the penalty prior to assessment. The preparer may file an administrative claim for refund if the penalty is assessed, and if that claim is denied by the IRS, the preparer may then come to this court for review. *See* S.Rep. No. 938—Part I, 94th Cong., 2d Sess. 356-57, *reprinted in* 1976 *U.S. Code Cong. & Ad. News* 2897, 3439, 3786.

Thus, the penalty process offers the expertise of IRS officers to initially deal with the challenged conduct and decide if it is subject to penalty. In a fashion similar to the employment discrimination laws, Congress has wisely directed that resolution of these preparer disputes first be attempted administratively before any judicial action is taken. Indeed, this process of initially proceeding administratively seems to be as much the rule as the exception under § 7407 for many preparers will undoubtedly be able to file the $50,000 bond required to stay the injunction action. Those financially unstable preparers who cannot file the bond seem logically to be the prime target of the injunction action.

The court's decision today does not nullify use of the injunction proceeding. As just discussed, it will be available to stop penalty conduct under § 7407(b)(1)(A) by preparers who are unable to file a bond as surety for the payment of penalties. The injunction will also be available to prevent preparer misrepresentation of eligibility to practice before the IRS or education or experience as a preparer under § 7407(b)(1)(B), as well as pre-

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[5] No cases involving the similar use of § 7407 by the government were cited by the parties nor found by the court.

parer guarantees of payment of any tax refund or allowance of any tax credit under § 7407(b)(1)(C).

It is not entirely clear what conduct is covered by 7407(b)(1)(D) which speaks of "other fraudulent or deceptive conduct which substantially interferes with the Internal Revenue laws." The use of the word "other" at least makes it clear that the provision does not cover conduct within any of the three preceding, more specific provisions. To conclude otherwise would render the § 7407(c) bond provision meaningless, a result that the body that enacted the provision almost certainly did not intend. It is likely that Congress simply thought it wise to include a "catch-all" provision to cover unforeseen conduct not within the three specific provisions.

In sum, this court concludes that E & W's filing of a bond under § 7407(c) creates an "insuperable bar" to the injunction proceeding as it relates to E & W as a preparer. The court finds that the conduct alleged in the complaint falls within § 7407(b)(1)(A) penalty conduct and is thus subject to the § 7407(c) bond. Consequently, the action against E & W as a preparer must be dismissed under Rule 12(b)(6).

4. E & W as an advisor

The government's fallback position in this case is that regardless of its entitlement to an injunction under § 7407, it is entitled to such relief under § 7402(a). Section 7402(a), set out in full above, gives the district courts authority to grant such relief, including injunctions, as may be necessary and appropriate to enforce the internal revenue laws. The section further provides that the "remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws." 26 U.S.C. § 7402(a). The government argues that this language provides an alternative way to seek

an injunction against E & W insofar as a preparer and is available even if an injunction is precluded under § 7407 by the filing of a bond. The court cannot agree with this position.

To allow the use of § 7402(a) to enjoin the same conduct that cannot be enjoined under § 7407(a) due to the filing of a bond would completely nullify § 7407(c)'s bond provision. Congress almost certainly did not intend such a result. Additionally, certain rules of statutory construction undermine the government's argument. First, as E & W has pointed out,[6] the interpretation of a statute in such a way as to render others meaningless is not favored and is to be avoided. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 519-20, 99 L.Ed. 615 (1955). As the court stated in that case, "'[t]he cardinal principle of statutory construction is to save and not to destroy.'" *Id.* at 538, 75 S.Ct. at 513 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 620, 81 L.Ed 893 (1937). To accept the government's argument would effectively destroy the bond provision of § 7407(c).

Two other rules of statutory construction support E & W's position that § 7407 is *the* injunctive remedy for return preparer cases falling within its scope. It is well settled that a specific statute takes precedence over a more general statute covering the same subject matter. *See Busic v. United States*, 446 U.S. 398, 406, 100 S.Ct. 1747, 1752, 64 L.Ed.2d 381 (1980). Moreover, a more recent enactment prevails over an earlier one. *See United States v. Crittenden*, 600 F.2d 478, 479-80 (5th Cir. 1979). Here, the more recently enacted and more specific provisions of § 7407 must prevail over the more general and previously enacted § 7402(a). Thus, insofar as E & W has acted as a preparer, its filing of a bond under § 7407

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[6] The court notes that *both* sides have done an excellent job of researching and presenting their respective positions in this litigation.

(c) must preclude the government's injunction action against it under either statute.

The government, however, argues that even if no injunction can issue against E & W as a preparer, this court nevertheless has jurisdiction under § 7402(a) to enjoin E & W in instances where it is not acting as a preparer but as an advisor. It is not entirely clear from the relevant statutes and regulations where conduct amounting to income tax return preparation ends and mere advising begins. *See supra* note 1. However, it is not necessary to define the boundaries of return preparation for the court has determined that even assuming there is some conduct on the part of E & W that does not reach the level of preparation, no authority exists for the issuance of an injunction against deceptive practices in advising under § 7402(a).

E & W argues that § 7402(a) alone cannot support an action for an injunction. It takes the position that that section is designed to provide jurisdiction and remedies for the enforcement of the internal revenue laws. Therefore, there must be some specific section to enforce to enable use of § 7402(a), and E & W argues there is no such section here. It contends that Congress stopped short of reaching advisors in enacting §7407 in 1976 and has not yet provided for a civil remedy against them.

The only case to address the issue of whether § 7402(a) of itself creates substantive rights held it does not. In *United States v. Mobil Corp.*, 543 F.Supp. 507 (N.D. Tex. 1981), the IRS, during an audit of Mobil, requested information concerning the number of exemptions claimed by Mobil's employees on tax withholding forms. When Mobil resisted, the IRS declined to issue a summons, but sought instead to obtain inspection of certain records under 26 U.S.C. § 6001. From the court the IRS sought a judicial declaration of its right to demand inspection without resort to the procedures for the issuance of a summons.

The court held that the IRS cannot rely upon § 6001 as a grant of a right of inspection, but that it must look to other sources, such as its administrative summons procedures, in order to inspect records required to be kept by § 6001. More importantly for this case, however, the court held that § 7402(a) gives the court jurisdiction to order compliance with other Code provisions, including § 6001. According to the court, § 7402(a) does not itself create a right to inspect.

The government conceded at the hearing on this motion that *Mobil* supports E & W's position, but argues that other authority entitles it to an injunction. One case the government relies on is *United States v. Landsberger*, 534 F.Supp. 142 (D. Minn. 1981), *aff'd*, No. 81-2426 (8th Cir. July 29, 1982). There, the defendant was enjoined from marketing a sham tax reduction scheme under which customers made anticipatory assignments of income to a trust in an attempt to avoid paying taxes on it. Discussing §§ 7402(a) and 7407, the court stated:

> Preliminarily, the Court notes that it has jurisdiction to grant such an injunction under both sections 7402(a) and 7407 of the Internal Revenue Code, Title 26, United States Code. Under section 7402 (a) the Court has jurisdiction to issue injunctions "as may be necessary or appropriate for the enforcement of the Internal Revenue laws." Section 7407 permits a district court to permanently enjoin a person from acting as a tax return preparer where he has engaged in fraudulent and deceptive conduct that substantially interferes with the proper administration of the tax laws.

534 F.Supp. at 144.

This court does not view *Landsberger* as endorsing its authority to grant an injunction under § 7402(a) without any supportive substantive Code section. As E & W points out, it does not appear that *Landsberger* posted a

bond under § 7407(c), and § 7407 could therefore have been used as authority for granting an injunction without § 7402(a). This element of a bond is central to the present case, however, indeed, the determinative question is whether § 7402(a) can be used since § 7407 cannot. Since no bond appears to have been filed by Landsberger, that court was not required to answer the difficult question that now confronts this court.

Nor do the other cases cited by the government convince the court that § 7402(a) alone suffices as authority for this court to enjoin advising activities. Indeed, all of the cases involve the seeking of a remedy under § 7402(a) for the violation of another section or for the collecting of an assessment.[7] The government seems to concede this point since it goes on to argue that the § 7042(a) injunction it seeks *is* tied to other, substantive provisions of the

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[7] *See United States v. First National City Bank*, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965) (jeopardy assessment against foreign corporation; § 7402(a) injunction against transferring out of country any property held for account of corporation proper); *In re Carlson*, 580 F.2d 1365 (10th Cir. 1978) (§ 7402(a)) can be used to enforce tax levies made under Code); *United States v. First National City Bank*, 568 F.2d 853 (2d Cir. 1977) (§ 7402(a) held to authorize injunction against bank ancillary to a summary proceeding to prevent its transfer of assets of taxpayer against whom IRS had made jeopardy assessment; *Brody v. United States*, 243 F.2d 378 (1st Cir. 1957), *cert. denied*, 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438 (1957) (§ 7402(a) order requiring defendant to give information concerning disposition of funds derived from recently liquidated securities following jeopardy assessment, criminal contempt order and summons held authorized); *United States v. Ohio Bell Telephone Co.*, 475 F.Supp. 697 (N.D. Ohio 1978) (§ 7402(a) order to make records available to enforce IRS' § 6001 authority to require records be available for inspection held authorized); *In re Gerwig*, 461 F.Supp. 449 (C.D. Cal. 1978) (held § 7402(a) authorized issuance of *ex parte* order allowing entry onto taxpayer's premises following tax assessments and creation of liens on property); *United States v. McNulty*, 446 F.Supp. 90 (N.D. Cal. 1978) (§ 7402(a) authorized order of repatriation of assets after taxpayer found liable for taxes in civil action).

Internal Revenue Code. The court is cited to a number of provisions in the Code dealing with various duties of the Secretary of the Treasury with respect to enforcing the internal revenue laws which E & W is said to be preventing or hindering.[8]

It is immediately apparent, however, that the government is unable to point to any provision of the Code dealing with liability of the defendants as advisors. All of the cases authorizing a § 7402(a) injunction did so on the basis of some statutory liability applicable to the defendant. These provisions relating to the duty of the Secretary will not suffice. Rather, the requisite underlying Code section must directly create some duty on the part of the defendant sought to be enjoined. Without such a section, this court agrees with the *Mobil* court that it has no authority to issue a § 7402(a) injunction. Perhaps a remedy is needed with respect to advising activities that do not come within the scope of § 7407. But this court cannot create a remedy *sua sponte* pursuant to § 7402(a) when Congress has not provided any liability for deceptive practices in advising that does not reach the level of preparation.

In sum, the court finds that E & W's filing of a bond under § 7407(c) precludes an injunction against it as a preparer. With respect to any nonpreparer activities, § 7402(a) of itself does not authorize an injunction and no provision of the Code creates the requisite underlying liability. Therefore, the court is without power to issue the requested injunctive relief and the defendants' motion to dismiss under Rule 12(b)(6) is GRANTED.

So ORDERED this 2nd day of November, 1982.

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[8] These provisions include, *inter alia*, § 7601, requiring the Secretary to canvass and inquire concerning taxable objects and persons; § 6201, requiring the Secretary to make assessments where proper; and §§ 7801-03 and 7805, dealing with the Secretary's duty to administer the revenue laws.

Judgment on Decision By the District Court Dated November 2, 1982

UNITED STATES DISTRICT COURT FOR THE UNITED STATES OF AMERICA
ATLANTA DIVISION

Civil Action Docket No. C82-501A

UNITED STATES OF AMERICA

vs.

ERNST & WHINNEY, *et al.*

JUDGMENT

This action came on for consideration before the court, United States District Judge ROBERT H. HALL presiding. The issues having been duly tried considered and a decision having been duly rendered, it is ordered and adjudged that the plaintiff take nothing; that the action is dismissed and that the defendants, ERNST & WHINNEY; MICHAEL W. TRAPP, Managing Partner, Ernst & Whinney; OLIVER C. MURRAY, JR., JERRY L. YOHEY, Tax Partner, Ernst & Whinney; Partner, Ernst & Whinney; THOMAS P. HENSLER, Fixed Asset Manager, Ernst & Whinney; ROBERT J. TAYLOR, IV, Senior Accountant, Ernst & Whinney; JOHN W. HYATT, JR., Former Manager-in-Charge, Industrial & Commercial Consulting Group, Ernst & Whinney; STEPHEN W. IMLER, Former Employee; JOHN DOE I; JOHN DOE II; JOHN DOE III; JOHN DOE IV; JOHN DOE V,

Officers, Agents & Employees, recover of the plaintiff THE UNITED STATES OF AMERICA their costs of this action.

Filed & Entered In Clerk's Office
November 2, 1982
BEN H. CARTER, Clerk

By: /s/ Carol O'Donnell
CAROL O'DONNELL, deputy clerk

Dated at: Atlanta, Georgia Date: November 2, 1982

BEN H. CARTER, Clerk

/s/
Deputy Clerk of the Court

**Judgment of
the Court of Appeals
Dated July 6, 1984**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8009

D.C. Docket No. C82-501A

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

ERNST & WHINNEY, a general partnership, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Georgia

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Before HILL, VANCE and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 6, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/
Deputy Clerk

Issued as Mandate: Sep. 28, 1984

**Order of the Court of Appeals
Correcting Opinion and Otherwise
Denying Petition for Rehearing
Dated August 29, 1984**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8009

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

ERNST & WHINNEY, a general partnership, *et al.*,
Defendants-Appellees.

Aug. 29, 1984

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(Opinion July 6, 1984, 11th Cir., 1984, 735 F.2d 1296)

Before HILL, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby GRANTED for the purpose of correcting the opinion in two particulars. First, in the next to last sentence of Part III.B.1., the three words "certainly or arguably" shall be deleted, and there shall be substituted in lieu thereof the words "which is," so that the sentence shall read:

> Claiming an investment tax credit on property which is ineligible is similar to claiming a full medical deduction when the governing law only allows a partial claim.

Second, in the next to last sentence of the penultimate paragraph of Part III, the word "arguably" shall be deleted, so that the sentence shall read:

> If this aggressive marketing scheme was coupled with Ernst's knowledge that the claims to be made were improper, the situation would be little different than a preparer promising potential clients a tax refund.

In all other respects, the petition for rehearing is DENIED.

Statutes And Regulation Involved

UNITED STATES CODE

26 U.S.C. § 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

26 U.S.C. § 7407. Action to enjoin income tax return preparers

(a) Authority to seek injunction.—Except as provided in subsection (c), a civil action in the name of the United States to enjoin any person who is an income tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as an income tax return preparer may be commenced at the request of the Secretary. Any action under this section shall be brought in the District Court of the United States for the district in which the income tax preparer resides or has his principal place of business or in which the taxpayer with respect to whose income tax return the action is brought resides. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such income tax preparer or any taxpayer.

(b) Adjudication and decrees.—In any action under subsection (a), if the court finds—

(1) that an income tax return preparer has—

(A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title.

(B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as an income tax return preparer.

(C) guaranted the payment of any tax refund or the allowance of any tax credit, or

(D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin such person from further engaging in such conduct. If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.

(c) Bond to stay injunction.—No action to enjoin under subsection (b) (1) (A) shall be commenced or pursued with respect to any income tax return preparer who files and maintains, with the Secretary in the internal revenue district in which is located such preparer's legal residence or principal place of business, a bond in a sum of $50,000 as surety for the payment of penalties under section 6694 and 6695.

26 U.S.C. § 6694. Understatement of taxpayers' liability by income tax return preparer

(a) Negligent or intentional disregard of rules and regulations.—If any part of any understatement of liability with respect to any return or claim for refund is due to the negligent or intentional disregard of rules and regulations by any person who is an income tax return preparer with respect to such return or claim, such person shall pay a penalty of $100 with respect to such return or claim.

(b) Willful understatement of liability.—If any part of any understatement of liability with respect to any return or claim for refund is due to a willful attempt in any manner to understate the liability for a tax by a person who is an income tax return preparer with respect to such return or claim, such person shall pay a penalty of $500 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

(c) Extension of period of collection where preparer pays 15 percent of penalty.—

> **(1) In general.**—If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is an income tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Preparer must bring suit in district court to determine his liability for penalty.—If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under subsection (a) or (b) is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the income tax return preparer fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) Suspension of running of period of limitations on collections.—The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(d) Abatement of penalty where taxpayer's liability not understated.—If at any time there is a final administrative determination or a final judicial decision that there was no understatement of liability in the case of any return or claim for refund with respect to which a penalty under subsection (a) or (b) has been assessed, such assessment shall be abated, and if any portion of such penalty has been paid the amount so paid shall be refunded to the person who made such payment as an overpayment of tax without regard to any period of limitations which but for this subsection, would apply to the making of such refund.

(e) Understatement of liability defined.—For purposes of this section, the term "understatement of liability" means any understatement of the net amount payable with respect to any tax imposed by subtitle A or any over-

statement of the net amount creditable or refundable with respect to any such tax. Except as otherwise provided in subsection (d), the determination of whether or not there is an understatement of liability shall be made without regard to any administrative or judicial action involving the taxpayer.

(f) Cross reference.—

For definition of income tax return preparer, see section 7701(a)(36).

26 U.S.C. § 7408. Action to enjoin promoters of abusive tax shelters, etc.

(a) Authority to seek injunction.—A civil action in the name of the United States to enjoin any person from further engaging in conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in conduct subject to penalty under section 6700. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) Adjudication and decree.—In any action under subsection (a), if the court finds—

(1) that the person has engaged in any conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.), and

(2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under section 6700.

(c) Citizens and residents outside the United States.— If any citizen or resident of the United States does not reside in, and does not have his principal place of business in, any United States judicial district, such citizen or resident shall be treated for purposes of this section as residing in the District of Columbia.

26 U.S.C. § 7701. Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(36) Income tax return preparer.—

(A) In general.—The term "income tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions.—A person shall not be an "income tax return preparer" merely because such person—

(i) furnishes typing, reproducing, or other mechanical assistance,

(ii) prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii) prepares as a fiduciary a return or claim for refund for any person, or

(iv) prepares a claim for refund for a taxpayer in response to any notice of deficiency

issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

TREASURY REGULATION

§ 1.6694-1 Understatement of taxpayer's liability by income tax return preparer.

(a) *Negligent or intentional disregard of rules and regulations.*

(4) If a preparer in good faith and with reasonable basis takes the position that a rule or regulation does not accurately reflect the Code and does not follow it, the preparer has not negligently or intentionally disregarded the rule or regulation. This test shall be applied in the same manner as it is applied under section 6653(a) and the regulations thereunder (relating to disregard of rules and regulations by taxpayers). For example, if a preparer reasonably takes the position in good faith that a revenue ruling does not accurately reflect the Code, the preparation of a return or claim for refund by the preparer in conflict with the revenue ruling is not a negligent or intentional disregard of the revenue ruling. For purposes of this paragraph (a), the view of the taxpayer concerning a rule or regulation is not material.

No. 84-852

Office-Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1984

ERNST & WHINNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-852

ERNST & WHINNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' holding that an accounting firm alleged to be promoting a deceptive tax-reduction scheme and to be obstructing IRS investigations of the firm's clients may be enjoined (assuming the government's allegations are established to be true) from engaging in such conduct under Section 7402(a) of the Internal Revenue Code, which empowers the district courts to issue "writs and orders of injunction" where "necessary or appropriate for the enforcement of the internal revenue laws."

1. The facts, as alleged in the government's complaint and in its supporting affidavits,[1] may be summarized as

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[1]The district court granted petitioners' motion to dimiss the government's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. For purposes of appeal, therefore, the well-pleaded allegations of the complaint and the facts set

follows. Petitioner Ernst & Whinney is one of the "Big Eight" accounting firms. It has more than 100 offices located throughout the United States. The individual petitioners, all accountants, are present or former partners or employees of Ernst & Whinney's Atlanta Office (R. 6-8).[2]

In 1977 petitioners began to advertise and market a service known as the "Investment Tax Credit Study." The Study is designed to enhance the ability of clients (or prospective clients) to claim investment tax credits (ITCs) under Sections 38 and 46-48 of the Internal Revenue Code.[3] Those Sections permit a taxpayer to credit against its federal income tax liability a percentage (generally 10%) of the cost of "qualifying property." The principal types of "qualifying property" are machinery, equipment, and other sorts of tangible personal property used in a manufacturing or similar business (I.R.C. § 48(a)(1)). Buildings and their structural components do not qualify for the investment tax credit (I.R.C. § 48(a)(1)(B)).

The stated purpose of petitioners' ITC Study, as set forth in their promotional literature, is to identify items that are "traditionally considered a part of a building," but which in petitioners' view are eligible for the ITC as qualifying personal property (R. 8-9; Complaint, Exh. 1 to Affidavit A at 5). Petitioners in their Study propose to identify "all direct and indirect costs relating to" such allegedly qualifying items and, by the use of what petitioners describe as "correct and specific titles, terms and asset classifications," to help

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forth in the government's supporting affidavits must be accepted as true, together with all inferences that may reasonably be drawn in the government's favor. Pet. App. 2a, 26a. See *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977).

[2]"R." refers to the Record Excerpt in the court of appeals.

[3]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

clients prevent the loss of ITCs through "misidentification" of such property (*ibid.*). In marketing their Study, petitioners make representations to taxpayers who own (or who plan to construct or acquire) buildings about tax savings potentially achievable through expanded use of the credit (Pet. App. 3a). If the taxpayer chooses to enlist their services, petitioners identify building components supposedly eligible for ITCs, obtain cost information about those items, and prepare a final report which describes the allegedly qualifying property in carefully phrased and "specific" terms. *Ibid.*

The actual purpose of petitioners' ITC Study, according to the government's complaint, is to advise taxpayers improperly to claim ITCs on nonqualifying property and to help taxpayers prevent the IRS from detecting those improper claims. To that end, it is alleged that petitioners systematically develop misleading and deceptive terminology for buildings and their structural components in order to make such property sound like "qualifying property" on the taxpayer's books and records. For example, petitioners in their ITC Studies allegedly have referred to concrete block walls as "knock-out panels"; to ordinary doors as "movable partitions — wood"; to fixed drywall interior walls as "movable partitions — gypsum"; to a section of a roof as an "equipment support"; to a building entrance canopy constructed of heavy timbers as "trellis work"; and to a shrubbery area constructed of brick and masonry as an "interior portable planter" (Pet. App. 3a n.1; R. 11-16). By using such terminology, it is alleged, petitioners hope that IRS agents examining the taxpayer's books and records will be misled into thinking that such clearly ineligible items qualify for the credit.

Similarly, petitioners are alleged to have developed misleading and deceptive terminology for property of questionable ITC eligibility in the hope that IRS examiners will

be unable to identify such items as potentially subject to challenge. For example, petitioners allegedly have referred to ordinary electric lighting fixtures in a building as "accent" or "decorative" lighting; to portions of streets and parking lots as "transportation and equipment accessways" and "truck accessways"; to shopping mall signs as "identifying devices"; to fixed industrial heating units as "portable plug-in" or "unit" heaters; and to dropped ceilings as "decorative soffits" (R. 11-16).

In furtherance of this tax-reduction scheme, petitioners are alleged to have taken other steps to frustrate IRS efforts to detect clients' improper ITC claims. The government's complaint alleges, for example, that petitioners have failed to maintain, or to provide to their clients, documentation sufficient to identify the specific cost components of assertedly qualifying property. Thus, even where IRS agents have succeeded in identifying improper ITC claims, it has allegedly been extremely difficult for the taxpayer or the IRS to reconstruct the property's correct cost basis (R. 16). Petitioners are also alleged to have created false or misleading documentation to support clients' ITC claims (R. 28-29), such as suggesting changes in an architect's terminology so that his records appear to supply independent proof of assertions (for example) that certain walls were intended to be movable (see Plaintiff's Memorandum in Support of Its Motion for Partial Summary Judgment 57-60).

The cumulative effect of petitioners' practices, according to the government's complaint, is to overburden the IRS's limited audit resources, to encourage taxpayers to claim ITCs on virtually every part of a building and its structural components except for the naked load-bearing shell, and to ensure that a significant percentage of such improper or questionable claims will go undetected and unchallenged by the IRS. Petitioners' ITC Studies appear to have been marketed nationally and to have been used by hundreds or

thousands of taxpayers, resulting in what the government believes may be enormous losses of revenue.[4] Petitioners' practices are thus alleged to hinder, obstruct and interfere with the government's ability properly to administer the internal revenue laws (R. 22-24).

2. The United States brought this action seeking to enjoin petitioners from "[a]dvertising, marketing, [or] selling" their ITC Studies, from advising the use by clients of "misleading, deceptive or false terminology" designed to prevent discovery of questionable or improper ITC claims on audit, and from "[h]indering, obstructing and impeding" the IRS in its investigation of petitioners' customers (Pet. App. 3a; R. 28-29).[5] Insofar as petitioners were functioning in connection with the Studies as "income tax return preparers" as defined in Code Section 7701(a)(36),[6] the government based its request for an injunction on Code Section 7407, which provides for the issuance of injunctions

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[4]In eight completed audits of taxpayers that used petitioners' ITC Studies in Ernst & Whinney's Southeastern Region — the region in which the firm's Atlanta office is located — there have been adjustments in excess of $3 million to the cost basis of property claimed to be eligible for the ITC, with a resulting tax increase of more than $300,000 (R. 22; Plaintiff's Supplemental Affidavit A at 1-2).

[5]Petitioners err in describing the relief sought in the complaint as an injunction barring them "from providing specified tax advisory services to their clients" (Pet. 1-2, 4). As explained the text, the complaint sought to enjoin petitioners, not from providing tax advice, but from "marketing" the ITC Studies and from using intentionally misleading terminology in providing tax advice.

[6]That Section generally defines an "income tax return preparer" as a person who prepares for compensation all or a substantial portion of any income tax return or claim for refund. Petitioners have taken the position that in most instances involving the ITC Studies they do not qualify as income tax return preparers. See Complaint, Exh. 1 to Affidavit C at 13. Whether petitioners were acting as return preparers is a factual determination that has not yet been made by the district court (Pet. App. 4a n.3).

against return preparers under specified conditions. Insofar as petitioners were not functioning as return preparers, the government based its request for an injunction on Code Section 7402(a), which empowers the district courts to issue "writs and orders of injunction * * * as may be necessary or appropriate for the enforcement of the internal revenue laws." After the complaint was filed, petitioners posted surety bonds under Code Section 7407(c) (Pet. App. 5a, 27a & n.2). That Section permits a return preparer to stay government actions to enjoin certain types of return-preparer misconduct by filing a $50,000 bond "as surety for the payment of [specified] penalties."

The district court granted petitioners' motion to dismiss the government's complaint for failure to state a claim upon which relief could be granted (Pet. App. 37a). The court ruled that petitioners' conduct could not be enjoined under Section 7407, reasoning that their posting of a bond precluded an injunction against them insofar as they were "return preparers" (Pet. App. 27a-32a). And the court held that petitioners' conduct (whether or not it constituted "return preparation") could not be enjoined under Section 7402(a) either, reasoning that that Section does not by itself authorize the issuance of injunctions, but rather applies only when the government seeks to enforce some "underlying Code section" which "directly create[s] some duty on the part of the defendant sought to be enjoined" (Pet. App. 37a). The district court concluded that the government was "unable to point to any provision of the Code" which imposed on petitioners a duty to refrain from the misleading, deceptive, and harassing conduct they were alleged to have engaged in (*ibid.*). Accordingly, the court held that it was without power to issue the requested injunction and granted petitioners' motion to dismiss under Fed. R. Civ. P. 12(b)(6) (Pet. App. 38a-39a).

3. The court of appeals unanimously reversed (Pet. App. 1a-20a). It held that either Section 7407 or Section 7402(a) could support issuance of an injunction, depending on what facts the IRS was able to prove on remand (Pet. App. 20a). The court of appeals accordingly remanded for investigation of the government's factual allegations and for consideration of the equitable factors that might bear upon the district court's exercise of its discretion to grant the requested relief (*ibid.*).

As to Section 7407, the court of appeals observed that the $50,000 bond posted by petitioners barred an injunction only to the extent that the conduct sought to be enjoined was conduct described in Section 7407(b)(1)(A) (Pet. App. 12a-13a, citing I.R.C. § 7407(c)). Section 7407(b)(1)(A) authorizes injunctions against "conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty."[7] The court concluded that, although much of petitioners' alleged misconduct did fall under Section 7407(b)(1)(A), their allegedly aggressive promoting and marketing of the ITC Study did not fall under that Section, but rather fell under Section 7407(b)(1)(D). That latter Section authorizes injunctions against any "fraudulent or deceptive conduct" of a return preparer "which substantially interferes with the proper administration of the Internal Revenue laws." To the extent that petitioners on remand are found to be functioning as "return preparers," therefore, the court of appeals held that their marketing activities could be enjoined under Section 7407(c) notwithstanding their posting of a bond — provided, of course, that

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[7]Sections 6694 and 6695 impose penalties on return preparers who negligently or willfully understate a taxpayer's tax liability, or who fail to take certain procederal steps, such as signing the taxpayer's return, supplying his identifying number, or furnishing the taxpayer with a completed copy of his return.

the government's allegations prove true and that "the showing required by § 7407 is made" (Pet. App. 20a).

The court of appeals also held that issuance of the requested injunction could be supported by Section 7402(a). That Section, the court observed, "encompasses a broad range of powers necessary to compel compliance with the tax laws" (Pet. App. 7a). Rejecting the district court's "narrow construction" of the Section, the court of appeals followed numerous decisions from other circuits that have authorized use of Section 7402(a) "to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute" (Pet. App. 7a (citing cases)). The court accordingly held that, to the extent petitioners on remand are found to be acting in a capacity other than that of return preparers, the district court has the power to enjoin them under Section 7402(a) if the government can demonstrate that they are improperly interfering with enforcement of the tax laws (Pet. App. 7a-8a). The court of appeals therefore remanded the case to the district court, noting that numerous "factual disputes * * * must be resolved" and that "the decision to issue an injunction under § 7402(a) is governed by the traditional factors shaping the district court's use of the equitable remedy" (Pet. App. 8a-9a).

4. Petitioners reiterate their contention that Section 7402(a) does not authorize the issuance of an injunction in the absence of another Code section imposing substantive duties on the person sought to be enjoined. Whatever the merits of petitioners' contention, it is not now ripe for review by this Court.[8] The court of appeals' decision places

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[8]It is now nearly three years since the government's complaint was filed and more than two years since the district court's decision was entered. Further interlocutory review at this time would cause serious additional delay in the trial of the government's allegations against petitioners.

petitioners in precisely the same position they would have occupied had the district court in the first instance denied their motion to dismiss the complaint and proceeded to trial on the merits. If, as a result of the proceedings on remand, the government's request for an injunction is denied, petitioners' contentions will be moot. If, on the other hand, the government succeeds in establishing its allegations against petitioners, and if the courts below determine that an injunction is justified under Section 7402(a) or under Section 7407, petitioners will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.[9]

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[9]Petitioners suggest (Pet. 9-10) that immediate review is appropriate, despite the interlocutory posture of the case, because "the issue is whether the matter should be determined in a court proceeding or [in an] administrative proceeding," a determination petitioners believe should be made now and "not after what could be years of litigation in a forum not intended by Congress." Similar arguments, of course, can usually be made by any petitioner who seeks certiorari while his case is in an interlocutory posture, and do not provide a reason for departing from this Court's normal practice of not undertaking piecemeal review of interlocutory orders. In any event, those arguments are particularly inapposite here. The court of appeals held that *either* Section 7407 *or* Section 7402(a) could authorize issuance of an injunction, and petitioners have sought review (Pet. i) of the latter holding only. Petitioners accordingly face a remand for trial on the merits of the government's allegations under Section 7407 in any event, and they are thus in no position to contend that the grant of interlocutory review would enable them to avoid an unnecessary trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[10]

REX E. LEE
Solicitor General

FEBRUARY 1985

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[10]Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will do so if the Court requests.

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No. 84-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ERNST & WHINNEY, a partnership; MICHAEL W. TRAPP, OLIVER C. MURRAY, JR., JERRY L. YOHEY, THOMAS P. HENSLER, III, ROBERT J. TAYLOR, IV, JOHN W. HYATT, JR., STEPHEN W. IMLER, JOHN DOE I through JOHN DOE V, Officers, Agents and Employees of Ernst & Whinney,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners (hereinafter collectively referred to as "E&W") submit this reply to the government's memorandum opposing their petition for certiorari. The government's memorandum is striking. After requesting and receiving two extensions of time to reply, the government does not dispute E&W's assertion that the decision below conflicts with decisions of this Court and Courts of Appeal holding that a statutory grant of jurisdiction to federal courts does not empower such courts to create new sub-

stantive duties (*see* Pet. 10-16). Nor does the government dispute E&W's contention that, contrary to decisions of this Court (*see* Pet. 16-21), the decision below undermines the comprehensive remedial framework carefully devised by Congress to limit the circumstances in which the government may seek injunctive relief.

The government has not and, in the three months it was permitted, could not refute those assertions. Rather, the government argues that the petition is not "ripe" for consideration by this Court. The government's argument is specious.

The matter is ripe for review by this Court for two reasons. First, if it is not reviewed now E&W will be denied the very rights it is seeking to protect. As explained in the petition, Congress in 1976 and 1982 enacted a comprehensive remedial statutory plan for the civil regulation of tax return preparers and advisers under the Internal Revenue Code. In enacting those provisions, Congress explicitly decided that tax advisers and tax return preparers should be subject to injunction by the United States only in limited circumstances. Tax advisers are only subject to injunction if they promote abusive tax shelters. Tax return preparers are subject to injunction for a broader variety of conduct, but the United States is barred from seeking injunctive relief against tax return preparers on specified claims if the preparers post statutory bonds. If a bond is posted—as it was in this case—then the government's claims may not be litigated in a federal district court but instead only in a non-injunctive administrative proceeding. The bonding provision thus confers upon a tax return preparer the right to protect itself from the burden and expense of an action in federal court. (Pet. 5.) If, without review by this Court, E&W is now made to litigate this matter to judgment in a federal court injunction action, E&W will have been denied the right it is seeking to vindicate—to avoid the expense and

burden of that injunctive litigation. Only if this Court acts now can petitioners' rights be sustained.[1]

The matter is also ripe for review because, as the government does not deny, the issues presented are purely legal. The issues do not turn on fact questions, or further development of facts. The legal issues are whether federal courts may entertain actions for injunctive remedies which Congress explicitly denied the government, and whether the federal courts may enjoin conduct not proscribed by statute merely because jurisdiction to issue an injunction in aid of enforcement of the law has been conferred. No trial is needed to resolve those issues; and if a trial is held, E&W will have been denied its right to avoid the cost and burden of a trial.

Consistent with E&W's position, this Court has repeatedly granted certiorari *before* a dispute has been resolved where the questions presented related to the proper forum for or nature of a proceeding to resolve the dispute. *E.g., Greene v. United States*, 376 U.S. 149 (1964); *Beacon Theatres v. Westover*, 359 U.S. 500, 501, 504 (1959); *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249 (1957); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43-44 (1938). Such a case is, in fact, now pending before this Court. In *Dean Witter Reynolds Inc. v. Byrd*, No. 83-1708, the issue is whether certain state claims should be combined with federal securities claims and litigated in federal district court or whether, instead, the state claims should be severed from the federal cause of action and be arbitrated. The issue in that action, as here, is in which forum and with what procedures the dispute should be litigated.

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[1] The government suggests that the court injunctive proceeding has been seriously delayed and that further "interlocutory" review would cause "serious additional delay" and should therefore be denied. Mem. Opp. 8 n.8. The issue is not delay, but whether there should be *any* court injunctive proceeding.

Indeed, the government itself has repeatedly sought, and the Court has repeatedly granted, certiorari in the same procedural posture that is presented here. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132 (1983).

In an effort to portray the issues before the Court as not "ripe", the government argues that even if this Court were to grant certiorari and rule in E&W's favor on Section 7402(a), an action would still proceed under Section 7407 because E&W does not challenge the finding of the Court of Appeals as to Section 7407. The government is wrong for two reasons. First, in its petition E&W by no means meant to suggest that it would not argue before this Court that the Court of Appeals was wrong as to Section 7407. Instead, as indicated in the petition, it is and has at all times been E&W's position that all of the conduct alleged against it as a preparer is covered by the bonding provision of Section 7407(c) and that, in accordance with the decision of the District Court, no injunctive action is permitted. Because the Court of Appeals' holding as to Section 7407 is very narrow, E&W did not emphasize it as a reason to grant certiorari. Nevertheless, contrary to the government's assertions, it did intend that, if certiorari was granted, the narrow issue as to Section 7407 would be encompassed by the issues for review.

Second, even if the government's suggestion were correct and an injunctive proceeding involving Section 7407 would continue, such an injunctive proceeding under the Court of Appeals' holding would be very limited. That such a very limited proceeding might continue would not, in light of the congressional remedial scheme, justify requiring E&W to participate in a far broader, lengthier, and costlier injunctive proceeding pursuant to Section 7402(a). The Court of Appeals' holding as to Section 7407 is limited to one narrow unpleaded theory. The government's position as to Section 7402(a) is that it

may litigate all the many issues presented in the original pleadings to the extent E&W is a tax adviser. It is the burden of such federal court litigation that the Congressional remedial plan permits a tax return preparer to avoid and which E&W is entitled to avoid.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated: February 26, 1985

Respectfully submitted,

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